Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Patrick J. Griffin, III seeks to display daily a historically accurate Confederate battle flag at Point Lookout Confederate Cemetery ("the Cemetery"), an all-Confederate national cemetery where 3,300 Confederate soldiers are buried. The Department of Veterans Affairs ("VA"), which owns and controls the Cemetery, refused Mr. Griffin's request pursuant to regulations that ban display of the Confederate flag 363 days a year. The Court of Appeals held that the VA's refusal was constitutional. This petition seeks review of the following questions:

I. Whether the VA may exclude Mr. Griffin's privately financed and maintained Confederate flag display from the Cemetery, a nonpublic forum for speech that honors the Confederate dead, on the grounds that (a) the Cemetery itself constitutes "government speech" that Mr. Griffin's flag display "garbles and distorts," and (b) Mr. Griffin's use of Cemetery property as the site for his flag display represents a "subsidy" that the VA may withhold on the basis of viewpoint.

II. Whether the VA may prohibit display of the Confederate flag at the Cemetery 363 days a year on the grounds that the flag honors the Confederate dead from a disfavored viewpoint, *i.e.* "as Confederates," not from a favored viewpoint, *i.e.* "as Americans."

III. Whether a restriction that empowers VA officials to exclude speech from the Cemetery on the basis of whether it honors the Confederate dead "as Americans" or "as Confederates" is unconstitutionally vague.

PARTIES TO THE PROCEEDING

The petitioner in this matter is Patrick J. Griffin, III, an individual.

Respondents are the United States Department of Veterans Affairs and two of its employees, Roger R. Rapp and Robin V. Pohlman, both of whom are sued in their official capacities only.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Patrick J. Griffin, III respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in *Patrick J. Griffin, III v. Department of Veterans Affairs, et al.*, 274 F.3d 818 (4th Cir. 2001).

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals is reported at 274 F.3d 818 and is set out hereinafter as Appendix ("App.") B. The district court's judgment, App. C., is reported as *Patrick J. Griffin, III v. Dept. of Veterans Affairs,* 129 F.Supp.2d 832 (D. Md. 2001).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 2001. Mr. Griffin's petition for reconsideration, or in the alternative for rehearing en banc, under Fourth Circuit Rules 35 and 40(c), was filed January 28, 2002 and denied February 12, 2002. *See* App. A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under the First Amendment to the United States Constitution, which provides in relevant part: "Congress shall make no law. . . abridging the freedom of speech...."

This case also involves 38 U.S.C. § 2403(c):

> All national and other veterans' cemeteries under the control of the National Cemetery Administration shall be considered national shrines as a tribute to our gallant dead and, notwithstanding the provisions of any other law, the Secretary is hereby authorized to permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day.

The case further involves the constitutionality, as applied, of 38 C.F.R. § 1.218(a)(14), which provides:

> (14) Demonstrations.
>
> (i) All visitors [to national cemeteries] are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. Jogging, bicycling, sledding and other forms of physical recreation on cemetery grounds is [sic] prohibited.
>
> (ii) For the purpose of the prohibitions expressed in this paragraph, unauthorized demonstrations or services shall be defined as, but not limited to, picketing, or similar conduct on VA property; any oration or similar conduct to assembled groups of people, unless the oration is part of an authorized service; the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee; disorderly conduct such as fighting, threatening, violent, or tumultuous behavior, unreasonable noise or coarse utterance, gesture or display or the use of abusive language to any person present; and partisan activities *i.e.* those involving commentary or actions in support of, or

in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise.

The case involves the facial constitutionality of National Cemetery Service Handbook 3220, "Flags in VA National Cemeteries," April 30, 2001 ("the New Flag Manual" or "NFM"), a true and correct copy of which is attached hereto as App. D.

STATEMENT OF THE CASE

A. Point Lookout Confederate Cemetery.

Point Lookout, Maryland is the site of one of the largest prison camps maintained by the United States during the Civil War. This case arises out of a request by Petitioner Patrick J. Griffin, III to display a historically accurate Confederate flag on a daily basis at Point Lookout Confederate Cemetery ("the Cemetery"), an all-Confederate cemetery owned by the Department of Veterans Affairs ("VA"), where 3,300 Confederate dead are interred in a mass grave. The VA, through its National Cemetery Service ("NCS"), owns and controls the Cemetery.

The Cemetery contains a main flag pole, from which the United States flag flies continuously. It also contains a granite Federal Monument and a smaller marble State Monument to the Confederate dead buried at Point Lookout. (*See* App. F., Lodging at 1-15 (photos of Cemetery)). The Federal Monument bears the names of the interred Confederates who have been identified. Inscribed on the State Monument are the following eulogies, among others: "At the call of Patriotism and duty they encountered the perils of the field, endured the trials of a Prison, and were faithful, even unto death," and "Dulce et decorum est, pro Patria Mori."

B. The VA's Confederate Flag Restrictions.

The VA permits private parties to display – at the discretion of VA officials – a diverse variety of American and foreign flags in its 119 national cemeteries. (NFM ¶¶ 2c.-2f., 7.) The VA adopted the NFM (App. D.) after the district court issued its judgment in favor of Mr. Griffin.[1] The NFM, like its predecessor regulations (App. E.), places three limitations on the display of Confederate flags ***that are not imposed on the display of any other flags.***[2]

The two-day restriction. The NFM (App. D., ¶ 7a., c.) restricts display of the Confederate flag to two days a year, Memorial Day and Confederate Memorial Day or an alternative ceremonial day. Additional "one-time" displays will be "considered on an individual basis." (¶ 7d.) The NFM provides no standards

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1 The original flag manual ("FM") placed the same restrictions on display of the Confederate flag as the NFM. The FM, however, explicitly encouraged the privately sponsored, daily display of the Families POW/MIA flag ("POW Flag"). (*See* FM, App. E., ¶ 7a., b., c.) After the district court referred to ¶ 7a. in rejecting the VA's "time-place-manner" argument, 129 F.Supp.2d at 844, the VA eliminated the overt encouragement of the privately sponsored, daily display of the POW Flag. But the underlying differential treatment of the two flags, while now more subtly phrased, remains.

2 Where Confederate dead are buried in individual graves, only "small individual Confederate grave flags may be placed...." (¶ 7 b.(1).) This restriction, which the NFM places only on the Confederate flag, does not apply at Point Lookout, where Confederate dead are buried in a mass grave. (¶ 7 b.(2).)

under which the VA decides whether additional displays will be allowed.

Organizational sponsor requirement. The NFM requires that the Confederate flag must be displayed by an approved organizational sponsor. (¶¶ 7c., 7a.) The manual (¶ 7c.) establishes a procedure for approval of an organizational sponsor, but again provides no standards for granting such approval. Further, the VA may revoke an organization's authorization (¶ 2g.) for conduct, on or off VA property, "not in keeping with NCA's responsibilities to maintain the integrity and decorum of the cemetery."

The deviation procedure. An individual seeking to display the Confederate flag on any occasion and an organization seeking to display the flag on additional days may do so only by obtaining written permission from the VA for a "deviation" from normal VA policy. (¶ 2b.) A request for a deviation must go first to the cemetery director, who may deny the request if it is "not in keeping with NCA's mission," whatever that may mean. The director has no power to approve a deviation. Instead, if she does not deny the request she must forward it with a recommendation for approval to the Memorial Services Network ("MSN") Director, who in turn forwards the application for decision by the Deputy Under Secretary for Operations ("DUO"). The NFM does not provide standards under which the DUO is to make his or her decision, although the DUO's decision is final. (¶ 2b.) By contrast, the director (in the exercise of an unlimited discretion) may grant permission for the display of a non-Confederate flag on any of the 363 days when display of the Confederate flag is banned. On such days, display of the Confederate flag would require a "deviation" under ¶ 2b.

The NFM provides that the cemetery director must forward the request for approval to the MSN Director at least fourteen (14) days before the proposed display and that the DUO must act on the request within five (5) business days of his receipt of the application. But the manual provides no time frame within which the MSN director must forward the request to the DUO. The MSN director thus could "sit on" a request for deviation indefinitely.

C. Criminal Penalties for Violation of the NFM.

Those who engage in an "[u]nauthorized demonstration or service in a national cemetery or on other VA property" are subject to "a term of imprisonment of not more than six months" and a fine of $250.00. 38 C.F.R. § 1.218 (b), (b)(9). Section 1.218 (a)(14)(ii) defines a "demonstration" as including the display of a flag.

D. The VA's Own Four-Year Display of the Flag.

Between 1994 and May 1998, the VA itself flew a Confederate flag at the Cemetery daily, on the main flag pole just below the United States flag. (*See* App. G.) No incidents of disruptive conduct occurred in connection with this display.

E. The District Court's Opinion.

In August, 2000, the VA refused Mr. Griffin's request to display daily a full-sized, historically accurate Confederate flag from a separate flagpole at the Cemetery. On September 21, 2000, Mr. Griffin filed a complaint against the VA and two VA officials in their official capacities. Mr. Griffin invoked federal-question jurisdiction under 28 U.S.C. § 1331. Mr. Griffin alleged that the VA's restrictions on display of the Confederate flag were unconstitutional, both on their face and as applied to him. On October 11, 2000,

Mr. Griffin filed a motion for preliminary injunction, with supporting declarations and a request for judicial notice. In response, on November 3, 2000, defendants (referred to as "the VA") filed an opposition and a cross-motion for summary judgment, also with supporting declarations. On November 30, 2000, the district court heard extensive oral argument from counsel.

On January 29, 2001, the district court issued its ruling. The court consolidated trial on the merits with the hearing on the preliminary injunction, as permitted by Fed. R. Civ. P. 65, and tried the case from the bench. 129 F.Supp.2d at 837. The district court refused to reach the merits of Mr. Griffin's facial challenge to § 1.218(a)(14) on the grounds that under 38 U.S.C. § 502, such a challenge must be brought in the Court of Appeals for the Federal Circuit.[3]

The court ruled that it had jurisdiction over Mr. Griffin's as-applied challenge to § 1.218(a)(14) and the predecessor regulations of the NFM (*See* App. E.). The court concluded that the Cemetery was a non-public forum, *id.* at 839-840 and that Mr. Griffin's proposed flag display was private speech. *Id.* 841-842. The court held the VA's refusal of Mr. Griffin's request unreasonable because the purpose of the Cemetery is to honor the Confederate dead and display of the flag furthered that purpose. *Id.* The court found that:

> [I]n the context of a Point Lookout, ***a cemetery established for the sole purpose of honoring***

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3 Mr. Griffin petitioned for review in the Federal Circuit. His petition was denied on April 30, 2002. *Griffin v. Secretary of Veterans Affairs*, ___ F.3d ___, 2002 WL 826931 (Fed. Cir. 2002). Mr. Griffin plans promptly to file a separate petition for certiorari with respect to this decision, and requests that the petitions be considered together.

> ***Confederate dead***, the only rational assumption is that the flag is being displayed because it is the flag under which those buried at Point Lookout fought and died. Additionally, the proposed subordination positioning of the Confederate flag to the U.S. flag and its positioning in the shadow of the other monuments, simply presents ***an unpretentious recognition that those who are buried there died as members of the Confederate Army***....

129 F.Supp.2d at 842. (Emphasis added.) The court rejected the VA's argument that display of the flag was inconsistent with maintaining the Cemetery as a shrine. The VA presented no evidence of any disruption the flag would cause. Further, the VA itself flew the flag from the Cemetery's main flag pole for four years without incident. The court rejected the VA's argument that Mr. Griffin's proposed display would constitute government speech because it was to be privately financed and unassisted by any government activity. *Id.* at 842.

The court also rejected the VA's argument that its restrictions on the Confederate flag were viewpoint-neutral. The VA's refusal to allow display of the flag, the court reasoned, targeted one or more viewpoints associated with it. In its briefs, the VA further admitted eight times that it restricted display of the Confederate flag because of the symbolic message it attributed to the flag. *Id.* at 843-844.

The court entered a declaratory judgment and permanent injunction that allowed Mr. Griffin to display the flag daily. The order provided for a sign to be placed at the base of the flag pole disclaiming any government sponsorship of the display. *Id.* at 839, n. 9.

F. The Court of Appeals' Opinion.

The Fourth Circuit reversed, 274 F.3d 818 (App. B.), holding that the VA's denial of Mr. Griffin's display was reasonable and viewpoint-neutral. Reasonableness, the court stated, is determined "in light of the purpose served by the forum...." The district court held that the "sole purpose" of the Cemetery was to honor the Confederate dead and that display of the Confederate flag furthered that purpose. 129 F.Supp.2d at 842, 844. The cornerstone of the Fourth Circuit's reasonableness analysis is its holding that the Cemetery serves a narrower purpose of honoring the Confederate dead "as Americans."

The court derives this purpose from 38 U.S.C. § 2403(c), which provides that national cemeteries are to be maintained as "national shrines," in "tribute to our gallant dead," where the United States flag is to fly every day. This language, the court reasoned, "all but inexorably lead[s] to the conclusion" that Congress intended national cemeteries to be "places in which we honor 'our gallant dead' *as Americans*." (Court's italics.) "[T]he reasonableness of the VA's restrictions," the court stated, "turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans." *Id.* at 822.

The purpose the Fourth Circuit attributes to the Cemetery raises the question of how daily display of the Confederate flag relates to honoring Confederate dead "as Americans." Any fair-minded examination of this question shows that display of the Confederate flag is fully consistent with honoring the Confederate dead "as Americans." The Confederates were, in the VA's words, "United States citizens." To honor them thus is to honor Americans. Confederate flags, moreover, are American flags. The Confederate battle flag emblem appears in the state flags of Mississippi and Georgia. The states of the former Confederacy are states of the

Union fully equal to any others. After the war, former Confederates served in the United States Senate, House and armed forces. One former Confederate officer, L.Q.C. Lamar, served as a Justice of this Court. Statues of Confederate generals Robert E. Lee and Joseph Wheeler – both depicted in Confederate uniform – Confederate President Jefferson Davis and Vice-President Alexander H. Stephens stand today in the United States Capitol as tributes to outstanding Americans.[4]

The Fourth Circuit did not address any of the above facts or discuss whether display of the Confederate flag honors the Americans who served the Confederacy "as Americans." It did not give Mr. Griffin the opportunity to brief the issue.[5] It did not address the district court's findings that, in the context of the Cemetery, the flag "simply represents an unpretentious recognition that those who are buried there there died as members of the Confederate Army." 129 F.Supp.2d at 842. Instead, the court just assumed that daily display of the Confederate flag is inconsistent with honoring the Confederates "as Americans." Logically, this assumption consists of two parts: (1) an inconsistency of some kind exists between honoring the Confederate dead "as Americans" and honoring them "as Confederates" *See* 274 F.3d at 822, n. 2 (finding eulogies "consistent" with honoring Confederates "as Americans" and implying the flag is not); and (2) the Confederate flag honors the

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4 *See* http://www.aoc.gov/cc/art/nsh/nsh_states.htm

5 The court says, *id.* at 821, 822, that "Griffin argues that the purpose of the Cemetery is to honor the Confederates...*as Confederates*." (Court's italics.) This statement is inaccurate. Both in the district court and on appeal (*See* Appellee's Brief at 32-34), Mr. Griffin argued that the sole purpose of the Cemetery was to honor the Confederate dead, not to honor them from any one viewpoint to the exclusion of another.

Confederate dead "as Confederates," and not "as Americans." The court did not make either these assumptions themselves or the reasons for them explicit in its opinion.

The next step in the court's reasonableness analysis is the transformation of the Cemetery from a nonpublic ***forum for private speech*** into ***speech by the government***. Again without demonstrating that its point is supported by the law or the facts, the court simply concludes that the VA may restrict display of the Confederate flag because:

> "Requiring the VA to allow the Confederate flag to fly daily over Point Lookout certainly "'garble[s] [and] distort[s]' the VA's chosen message" of honoring the Confederate dead as "United States citizens who died in service of the Confederacy...."[6]

Id. at 822. Restriction of the Confederate flag to two days a year, said the court, is necessary to protect the government's own speech. Significantly, the court does not identify any recognized form of communication by the government (such as display of a flag, a radio broadcast or a sign) with which Mr. Griffin's flag display would interfere. Nor does the court demonstrate how the VA "speaks" by means of the Cemetery. Instead the court simply calls the Cemetery's supposed purpose the VA's "own message," which Mr. Griffin's flag display for some unstated reason "garbles and distorts." The court adds that the VA is not required to "subsidize Griffin's speech by allowing him to use the federally-owned

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[6] The Department of the Interior is less troubled by the daily display of Confederate flags along with historical and modern United States flags at Fort Sumter. *See* http://www.nps.gov/fosu/sb/fosuflag/

Cemetery, particularly when that speech undermines the government's own message." *Id.* at 822.

The VA advanced three arguments to show that allowing Mr. Griffin's display could be harmful to the Cemetery. The court agreed with all three. First, said the court, the VA could "reasonably believe that the Confederate flag "*could* cause controversy and that such controversy *could*" threaten the tranquility of the Cemetery. Second, the VA could reasonably prohibit Mr. Griffin's requested display on the grounds that "other groups would demand that their flags be flown over the Cemetery." Third, if it allowed Mr. Griffin's flag display, the VA "may have to contend with counterspeech" opposing or protesting Mr. Griffin's Confederate flag display. *Id.* at 823-824. The court ignored the district court's findings that the VA's own four-year, incident-free display of the flag and its failure to present any evidence that a disturbance was likely belied its purported fears. 129 F.Supp.2d at 841.

The court then moved on to viewpoint neutrality. In the district court, the VA admitted that because the Confederate flag purportedly "symbolizes the South's attempt to leave the country, and thus, to perpetuate the slavery of black persons," it was "imminently [sic] reasonable [for the VA] to treat Confederate flags differently from ... other flags...." Based on this and seven other similar references in the VA's own briefs, the district court found that the VA's refusal to permit Mr. Griffin's flag display was viewpoint-based. 129 F.Supp.2d at 843.

The Fourth Circuit ignored this finding and reasoned, 274 F.3d at 824, that the VA did not engage in viewpoint discrimination because the NFM actually confers an advantage on those who seek to display the Confederate flag. That purported "advantage" is that the NFM "automatically" allows display of the Confederate flag two

days a year, even though it expressly bans display of the flag the other 363 days. *Id.* at 823. The court dismissed Mr. Griffin's attempt to point out that the "advantage" conferred by the NFM is to ban display of the Confederate flag 363 days a year as "simply miss[ing] the structure of the rules laid out" in the NFM. *Id.* at 824, n. 2.

Mr. Griffin challenged the facial constitutionality of the NFM on the grounds that it lacked definite substantive standards and procedural safeguards that guarantee a prompt decision on a request to speak. The court rejected this challenge on the grounds that (1) the NFM had been applied to Mr. Griffin in a constitutional fashion, citing *United States v. Salerno*, 481 U.S. 739 (1987); and (2) the precise form of expression in which Mr. Griffin sought to engage was not permitted at the Cemetery. Although these holdings are also contrary to Court precedent, the Court need not address them here. If the Court grants certiorari as to the three questions Mr. Griffin has posed, this portion of the decision below will at least have to be vacated, because the NFM will not have been "constitutionally applied" to Mr. Griffin, and his "precise form of expression" will not be prohibited.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE DISTINCTIONS BETWEEN SPEECH AND THE FORUM FOR SPEECH AND BETWEEN PRIVATE SPEECH AND GOVERNMENT SPEECH

Fundamental to forum analysis is the distinction between speech and the forum in which speech occurs. Equally fundamental is the distinction between the private speech that government may regulate only in a viewpoint-neutral way and government's ability to choose the viewpoint it will express or subsidize private parties to

communicate. The decision below blurs these distinctions in reaching a result at odds with the Court's decisions.

A. The Forum vs. Speech in the Forum.

The Tenth and Fourth Circuits have noted a dearth of Supreme Court guidance in regard to what is government speech. *Wells v. City and County of Denver*, 257 F.3d 1132, 1140 (10th Cir.), *cert. denied*, ___U.S. ___, 122 S. Ct. 409 (2001); *Sons of Confederate Veterans v. Comm. of Va. Dept. of Motor Vehicles*, ___ F.3d ___, 2002 WL 753229 at 5 (4th Cir. 2002)("*SCV/DMV*"). The Fourth Circuit held that Mr. Griffin's proposed flag display "garbles and distorts the VA's chosen message" of honoring the Confederates "as Americans." 274 F.3d at 822. In a novel step beyond existing government-speech cases, the court did not identify any recognized communicative act by the VA, such as a physician's giving family–planning advice to a patient, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), the broadcast of a radio message, *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*,203 F.3d 1085 (8th Cir.) *cert. denied*, 531 U.S. 814 (2000), or the display of a sign, *Wells*, 257 F.3d at 1139, whereby the VA communicates its purported message.

Instead, the court simply concludes that the VA is using the Cemetery itself to communicate its purported message of honoring the Confederate dead "as Americans." 274 F.3d at 822. The court thus transforms the Cemetery from a government-owned ***forum*** for private speech – where viewpoint discrimination is unconstitutional – into ***government speech*** – which may express the government's favored viewpoint. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). The court's transformation fails, however, for at least two reasons: First, the Cemetery is not speech by the VA. It is the site for Mr. Griffin's communication of a private message. Second, the

VA's purported message, "honoring the dead as American citizens," 274 F.3d at 823, is not a message. It is a viewpoint.

In no case that counsel is aware of has the Court decided whether real property owned by the government is itself speech. Establishment Clause cases have focused on whether a given religious symbol could be attributed to the government, not whether the entire government property where the symbol was located constituted government speech. *See, e.g., County of Allegheny v. American Civil Liberties Union, Etc.*, 492 U.S. 573 (1989). In *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995), a private party sought to place a religious symbol in the mall area next to the Ohio state capitol. The Court held that display of the symbol represented private speech.

In several cases, government support of speech through funding or the use of government-owned broadcast facilities has raised the question of whether such speech was that of the government or private parties. In *Rosenberger,* 515 U.S. at 830, 833-834, the Court held that university funding of a variety of student speech created a "metaphysical" nonpublic forum subject to the viewpoint-neutrality requirement, not government speech. In *Arkansas Educational Tel. v. Forbes*, 523 U.S. 666, 677-678, 681-682 (1998), the Court held that a public television broadcast of a political debate was a nonpublic forum, not government speech. In *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000), the Court held that a university's mandatory funding program for student speech, while not quite a forum, nevertheless was subject to the viewpoint-neutrality requirement.

Other circuit courts also have held that government-owned property from which private parties communicate a message of their choosing is a forum for private speech, not speech by the

government. *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) *cert. denied,* ___ U.S. ___, 2002 WL 549069 (2002) (license plate); *SCV/DMV*, 2002 WL 753229 at 5-8(license plate); *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997)(history department display case); *United Food and Commercial Workers v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998)("UFCW")(advertising space on public bus); *Airline Pilots Assn. v. Dept. of Aviation of Chicago*, 45 F.3d 1144 (7th Cir. 1995)(display case in airport); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied,* 532 U.S. 903 (2001)(adopt-a-highway program). *See also* M. Herald, "Licensed to Speak: The Case of Vanity Plates," 72 COLORADO L. REV. 595, 619 (2001); R.P. Bezanson and W.G. Buss, "The Many Faces of Government Speech," 86 IOWA L. REV. 1377, 1436 (2001)("A baseline requirement of a distinct and clear message, combined with the requirement of an intent to speak and reasonable success in actually reaching an audience with the message would help greatly in giving shape and definition to the government speech concept."). Like the government property discussed by the above authorities, the Cemetery is government property where private speech occurs. It is not speech by the government.

B. Government Speech vs. Private Speech.

A more appropriate government-speech analysis would focus on the display of flags by private parties in national cemeteries and Mr. Griffin's particular flag display.[7] Within this framework, one could apply a four-factor test the Eighth, Tenth and Fourth Circuits

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[7] The real forum is not the whole Cemetery, but the small part of it to which Mr. Griffin seeks access to install a flag pole. *Cornelius*, 473 U.S. at 801-802. The notion that the VA seeks to communicate any message from every square foot of the Cemetery is not only without a shred of support in the record but patently implausible.

have used to distinguish between private and government speech. *Knights*, 203 F.3d at 1093-1094; *Wells*, 257 F.3d at 1140-1141. These factors, which focus on traditional communicative acts, are (1) whether the purpose of the communication is to express government or private views; (2) who has editorial control over the message; (3) who is the literal speaker; and (4) who bears the ultimate responsibility for the speech. All of these factors favor treatment of Mr. Griffin's flag display as private speech. The NFM (¶ 2c., d., 7., 8.) permits display of a wide variety of flags, pennants and guidon banners "as long as they commemorate honorable military service...." Within this general limitation, private flag display reflects the views of the private speakers. Mr. Griffin's flag display is entirely his own message, with which the VA disclaims any connection. The purpose of private flag display at national cemeteries thus is to communicate a variety of private messages.

Mr. Griffin has editorial control over his flag display. He chooses the flag to fly on any given day (as long as it is a historically accurate Confederate flag). He (or one of his associates) raises the flag and thus is the literal speaker. And Mr. Griffin bears the ultimate responsibility for the display. The district court's order, 129 F.Supp.2d at 839 n. 9, and ¶ 7f. of the NFM confirm the exclusively private responsibility for the flag display.

Perhaps the VA could argue that the combination of the monuments, the United States flag, the identification sign and the appearance of the Cemetery represent a communicative act by the government. But the VA did not make any such argument and no such discussion is presented in the Fourth Circuit's opinion. Such an argument has disturbing implications. If the Cemetery as a whole sends a government "message" (which the Fourth Circuit equates to the purpose it attributes to the Cemetery), so does all government property. It is no more a stretch to argue that the Ohio state capitol and surrounding grounds send a message of neutrality

toward religion which a cross garbles and distorts than to argue that the Cemetery sends a message of honoring the Confederate dead "as Americans," which display of the Confederate flag garbles and distorts. The Fourth Circuit's rationale implies a transformation of virtually all government property into government speech. That would allow government everywhere to "choose sides as far as its own message [*i.e.* property] is concerned." 274 F.3d at 824. The result would be either the end of the viewpoint-neutrality requirement or an attempt by the federal courts to draw lines between expressive and non-expressive federal property.

If the Cemetery "says" something, what does it say? The Fourth Circuit holds that the VA's "message" "in this case, coincides with the [Cemetery's] purpose," 274F.3d at 821, which purportedly is to "honor, *as Americans*, those who are buried" at the Cemetery. *Id.* But honoring the Confederate dead "as Americans" is not a message that could be conveyed by a traditional communicative act. One does not hold up a sign that reads, "Honoring the dead as Americans." A person holds up, for example, a sign that reads "We remember our heroes," with a United States flag drawn on it. That a message honors the dead "as Americans" is something one says about a message. It is a viewpoint the message expresses. If the Cemetery conveys an identifiable message, that too is a question, and a complex one, of fact that the district court should at least have the opportunity to examine. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-575 (1985). The Court should grant review in this case to clarify the distinction between a message by the government and a viewpoint expressed by the government itself or a private party, and the role of the trier of fact in determining whether such a message exists and if so, what that message may be.

Beneath the surface of the Fourth Circuit's conclusion of the "VA's overall message of honoring the dead *as American*

citizens," (court's italics), 274 F.3d at 823, is a serious confusion of the basic categories of the Court's forum analysis. To correct this confusion the Court should grant review.

C. Private Speech vs. Government Subsidy.

A variation on the Fourth Circuit's "government speech" rationale is its subsidy theory. The court reasons, 274 F.3d at 822, that the VA's denial of Mr. Griffin's request to fly the flag daily was a decision "that 'public funds [in the form of use of land] be spent for the purposes for which they were authorized,'" citing *Rust*, 500 U.S. at 196. The court thus transforms a nonpublic forum where viewpoint neutrality is required into a government decision to fund its own message, which may be viewpoint-based. *Rust* at 193; *Maher v. Roe*, 432 U.S. 464, 475 (1977).

The Fourth Circuit's characterization, however, is contrary to this Court's decisions. In prohibiting Mr. Griffin's flag display the VA is regulating private speech, not funding dissemination of its own message. *Rosenberger*, 515 U.S. at 834;*Legal Services Corp. v. Velasquez*, 531 U.S. 533, 544 (2001). As noted above, the district court's order, 129 F.Supp.2d at 839, n. 9, and the NFM itself (¶¶ 7e., f.) make clear that the flag Mr. Griffin intends to display sends his message, not the VA's. The VA disclaimed any sponsorship of the flag display whatsoever. The applicable rules thus are those of forum analysis, not government funding of the government's own message.

Further, where the government "subsidizes" private speech by providing public property as the site for speech, the relevant analysis is forum doctrine, not government speech. Indeed, "the entire public forum doctrine is in effect a constitutional restriction on the allocation of a government subsidy (in the form of government-owned property)." *Larouche v. Federal Election Commission*,

996 F.2d 1263, 1269 (D.C. Cir.),*cert. denied,* 510 U.S. 992 (1993), *citing Rust*, 500 U.S. at 199-200.

The subsidy analogy further fails because subsidies may not be coercive and may not impose a "penalty on disfavored viewpoints." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587, 588-589 (1998); *Forbes*, 523 U.S. at 676-677. The sanctions for engaging in disapproved speech at the Cemetery are plainly coercive: arrest, fine and imprisonment. 38 C.F.R. § 1.218(b), (b)(9). The VA further refused Mr. Griffin the "subsidy" of access to the Cemetery precisely because of the viewpoints he sought to express. 129 F.Supp.2d at 843.

In its subsidy analysis, the Fourth Circuit relies heavily on *Rust*. There the government paid doctors to communicate family-planning information that did not include information about abortion. In holding that the abortion exclusion did not violate the First Amendment, the Court emphasized that the exclusion represented the government's decision to fund one activity rather than another, not the suppression of a viewpoint. *Id.* at 193. In *Velasquez*, 531 U.S. at 541, the Court noted that in *Rust*, the government was the speaker because it was paying private parties to communicate the government's message.

Rust might have some application here if the government were funding Mr. Griffin's display of a government-approved flag and Mr. Griffin demanded to use that money to display a Confederate flag instead. But those are not the facts of this case. Mr. Griffin is receiving no government money or other assistance for his flag display, nor can he under VA rules (NFM ¶¶ 7e., 7f). Mr. Griffin is not sending the government's message. He seeks to send his own message, at his own expense. *Rust* therefore is inapplicable.

The decision below trivializes the First Amendment by treating coercive, viewpoint-discriminatory speech regulation as the government's choice of which message it will fund. The Court should grant review to clarify this distinction, on which hangs the fundamental requirement of viewpoint neutrality.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT GOVERNMENT MAY NOT RESTRICT ACCESS TO A NONPUBLIC FORUM ON THE BASIS OF VIEWPOINT.

The VA permits private flag displays at national cemeteries only to "commemorate military service." (NFM ¶¶ 2a., d.) Just as the flag of the 101st Airborne Division commemorates the military service of veterans who served in that division, Confederate flags commemorate the military service of Confederate soldiers.[8] Display of the Confederate flag at the Cemetery thus is a form of speech within the "includible subject" of honoring the Confederate dead. *Cornelius*, 473 U.S. at 806.

The Fourth Circuit reasons that the VA may exclude the Confederate flag from the Cemetery because under 38 U.S.C. § 2403(c) the purpose of the Cemetery is to honor the Confederate dead "as Americans" and the flag purportedly honors them "as Confederates." 274 F.3d at 822, 823-824. The only difference, however, between the permissible speech that honors the Confederate dead "as Americans" and the excludable speech that honors them "as Confederates" is one of viewpoint. In *Texas v. Johnson*, 491 U.S. 397, 413 n. 9 (1989), where the Court

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[8] If a national cemetery were set aside for war dead of the 101st Airborne Division, one doubts that the VA would even think of banning the division's flag from such a cemetery 363 days a year.

overturned a criminal conviction for flag-burning, the Court recognized that "surely one's attitude toward the [United States] flag and its referents is a viewpoint." Burning a United States or a Confederate flag expresses such a viewpoint. So does displaying the flag. *See id.* at 404-405. Federal courts thus have repeatedly held that speech regulations that selectively forbid display of Confederate-flag symbols are viewpoint-based. *Castorina v. Madison County School Board*, 246 F.3d 536, 542 (6th Cir. 2001); *SCV/DMV,* 2002 WL 753229 at 9-12 (4th Cir. 2002); *Sons of Confederate Veterans v. Holcomb*, 129 F.Supp.2d 941, 944 (W.D. Va. 2001), *aff'd* 2002 WL 753229 (4th Cir.2002); *Sons of Confederate Veterans v. Glendening*, 954 F.Supp. 1099, 1102-1103 (D. Md. 1997). The decision below allows the VA to exclude the Confederate flag from the Cemetery 363 days a year because of the viewpoint(s) it expresses. This exclusion is viewpoint discrimination in a nonpublic forum, which violates the First Amendment.

By defining the purpose of the forum in viewpoint-discriminatory terms the court is able to hold that the VA's exclusion of Mr. Griffin's viewpoint is reasonable precisely because it discriminates on the basis of viewpoint. This reasoning "make[s] principles intended to protect speech easy to manipulate" in order to suppress speech. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 786 (1996)(Kennedy, J., concurring in part and dissenting in part). In the context of government-funded legal representation, the Court in *Velasquez*, 531 U.S. at 547, recognized that, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." By the same logic the VA may not condition access to a nonpublic forum on the expression of a favored viewpoint, lest the First Amendment be similarly trivialized. *See* L.G. Jacobs, "The Public Sensibilities Forum," 95 NORTHWESTERN L. REV. 1357,

1393 (2001) (viewpoint-neutrality requirement forbids viewpoint-based conditions of access to a forum).

The VA sought to justify its viewpoint-based denial of Mr. Griffin's request to display the flag on the grounds that it might cause (1) disruption of the tranquility of the Cemetery; (2) a proliferation of requests to display flags at the Cemetery; and (3) demands to engage in "counterspeech" opposing or protesting the flag. 274 F. 3d at 823-824. To decide whether the VA may condition access to the Cemetery on the basis of viewpoint, it is necessary to address these justifications.

Display of the Confederate flag is no more inherently "disruptive" than the display of any other flag. (*See* App. H.) The VA's justifications are founded on the "heckler's veto" theory that government may restrict display of the flag in order to avoid an adverse public reaction. The Court, however, has squarely rejected this theory. *Good News Club v. Milford Central School Dist.*, 533 U.S. 98, 119 (2001); *Cohen v. California*, 403 U.S. 15, 23 (1971). The Fourth Circuit itself has rejected the heckler's veto. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985), *cert. denied,* 476 U.S. 1159 (1986).

In accepting the VA's justifications as reasonable, the Fourth Circuit also overlooked a critical fact: For four years (1994-1998)the VA itself displayed the flag every day from the Cemetery's main flag pole without incident. (*See* App. G.) The court also ignored the VA's failure to adduce evidence that a disturbance was likely. 129 F.Supp.2d at 841. Mere "[u]ndifferentiated fear... of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969). The VA's fears are not merely "undifferentiated." They are contrary to four years of recent experience. For the VA to ignore that experience is unreasonable.

The disruption and counterspeech justifications boil down to the idea that government may prohibit "controversial" speech. Such prohibitions, however, must be viewpoint-neutral. *Cornelius*, 473 U.S. at 811; *Forbes*, 523 U.S. at 676. The VA refused Mr. Griffin's request to display the flag specifically because it was a Confederate flag, i.e. an expression of certain viewpoints. "[T]he specific motivating ideology or the opinion or perspective of the speaker [was] the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The VA claimed to fear an adverse reaction to "a distinctive idea, conveyed by a distinctive message," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-392 (1992). Such restrictions are not viewpoint-neutral. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992)("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Sons of Confederate Veterans v. Glendening*, 954 F.Supp. at 1104 ("A desire to stem listeners' reactions to speech is simply not a viewpoint-neutral basis for regulation.") The Fourth Circuit thus holds that the VA may impose a viewpoint-specific access restriction on controversial speech, which conflicts with *Cornelius*.

The VA's proliferation argument is really about the scarcity of government resources. Proliferation is problematic only if government has too little space and employee time to accommodate every request to speak. But "government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835. Proliferation calls for a neutral rationing of scarce resources, not viewpoint discrimination. *Id.*

The Fourth Circuit suggested yet another justification, based on deference to administrative decisions. The court held, 274 F.3d at 823, that Congress delegated determinations of whether speech would disrupt the tranquility of the Cemetery "not to the district court or to Griffin," but to the VA. The court thus appears to adopt

an abuse-of-discretion standard of First Amendment review, a principle the Court and other circuits have rejected. *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *United Food & Com. Workers v. Southwest Ohio Reg. Trans. Dist.*, 163 F.3d 341, 357-358 (6th Cir. 1998); *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1285 (10th Cir.), *cert. denied*, 528 U.S. 871 (1999).

The Fourth Circuit also ignored other key findings of fact that it should have reviewed for clear error under FED. R. CIV. P. 52(a) and *Anderson*, 470 U.S at 573-575. The district court found that the "sole purpose" of the Cemetery is to honor the Confederate dead. 129 F.Supp.2d at 842. The reasonableness of a speech restriction depends not just on the government's asserted purpose but on the forum's "special attributes" and the "surrounding circumstances," which can be "determinative" of the reasonableness of a speech restriction. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 666, 687-688 (1992) (O'Connor, J., Concurring.); *Multimedia Publ. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162-163 (4th Cir. 1993). These attributes and circumstances are questions of fact. *See Lee*, 505 U.S. at 688-689; *Multimedia*, 991 F.2d at 163. The special attributes and circumstances of Point Lookout include (1) it is an all-Confederate cemetery; (2) the VA flew the flag for four years without incident; and (3) the Cemetery is the site for flag-laden ceremonies every year. The Fourth Circuit should have reviewed the "sole purpose" finding for clear error, but chose instead to derive the purpose of the forum solely from § 2403(c).

Another key finding was that in Mr. Griffin's proposed display, the Confederate flag, displayed in a subordinate position to the U.S. flag, "simply represents an unpretentious recognition that those who are buried [at Point Lookout] died as members of the

Confederate Army." 129 F.Supp.2d at 842. This finding implies that Mr. Griffin's flag display is consistent even with the Fourth Circuit's view that the purpose of the Cemetery is to honor the Confederates as "United States citizens who died in service of the Confederacy." 274 F.3d at 822. The court recited this finding but refused to accord it any legal significance.

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT SPEECH RESTRICTIONS IN A NONPUBLIC FORUM MUST COMPLY WITH CONSTITUTIONAL PROHIBITIONS AGAINST VAGUENESS.

Speech restrictions must provide "narrow, objective and definite" criteria to guide official discretion. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969); *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 759-760 (1988); *Forsyth County*, 505 U.S. at 131. No objective standards exist, however, for applying the court's "pivotal distinction" between speech that honors the Confederate dead "as Americans" and speech that honors them "as Confederates." Especially in relation to flag displays the distinction is difficult to draw because virtually everything Confederate, including the Confederate Battle Flag, is also American.

To cite but one example, the Lone Star flag of Texas is the flag of a state and thus an "American" flag. But it was also the battle flag of the First Texas Infantry, a group of "United States citizens" famous as part of the Confederate Army of Northern Virginia.[9] Would the Texas flag honor the "United States citizens" who fought under it "as Americans," or "as Confederates?" It is impossible

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[9] *See* http://www.texas-brigade.com/frmain1tex.htm.

objectively to fit the flag into one category to the exclusion of the other. The same is true of virtually all Confederate flags, including the battle flag.

The vagueness of the court's "as Americans" vs. "as Confederates" distinction is evident from footnote 2 of its opinion. 274 F.3d at 822. There the court finds that the name "Confederate Cemetery" and the eulogies on the State Monument to the Confederates' wartime patriotism-- *i.e.* their loyalty to the Confederate States of America -- are consistent with honoring the Confederates "as Americans." But if this is so, the flag that symbolizes the Confederates' devotion to their cause and their Confederate military service is also consistent with honoring them "as Americans."

The vagueness of the court's "pivotal distinction" permits the arbitrary and viewpoint-discriminatory speech prohibitions that have led the Court to hold similarly vague restrictions unconstitutional. *Jews for Jesus*, 482 U.S. at 576; *Lakewood*, 486 U.S. at 763; *Nationalist Movement*, 505 U.S. at 133. The potential for such abuse is heightened here because "unauthorized" flag display at the Cemetery subjects the speaker to criminal prosecution. 38 C.F.R. § 1.218(b), (b)(9); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Some doubt, however, exists as to the extent to which *Shuttlesworth* applies in a nonpublic forum. The Court has applied the rule against unbridled official discretion in the context of an airport that the Court treated as a nonpublic forum. *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 576 (1987). But in *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. at 684 (Stevens, J., Dissenting), the Court upheld access restrictions in a nonpublic forum over the dissent of three Justices who argued that the restrictions were unconstitutional because they lacked definite standards.

The circuit courts are divided on the issue. In *Lewis*, 253 F 3d at 1080-1081, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001) and *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1199 n. 11 (11th Cir. 1991), the courts applied the *Shuttlesworth* rule in fora the courts either held or assumed to the nonpublic. But in Mr. Griffin's companion case, *Griffin v. Secretary of Veterans Affairs*, ___ F.3d ___, 2002 WL 826931 (Fed. Cir. 2002), the court found an absence of controlling Court authority and held that unlimited discretion is permissible in a nonpublic forum, and national cemeteries in particular, if it is "aimed at preserving the property for the purpose for which it is dedicated." This split requires resolution by the Court.

The *Shuttlesworth* requirement of definite standards should apply in a nonpublic forum. The constitutional concerns that underlie the *Shuttlesworth* principle are (1) self-censorship by speakers who fear the adverse consequences of engaging in disapproved speech; and (2) an inability to determine when denial of the right to speak under an imprecise standard is legitimate and when it amounts to impermissible censorship. *Lakewood*, 486 U.S. at 757-758. As the Court has recognized, censorship is synonymous with viewpoint discrimination, *R.A.V v. City of St. Paul*, 505 U.S. 377, 430, 112 S.Ct. 2538 (1992), which is impermissible in a nonpublic forum. The reasons that animate *Shuttlesworth* in public fora therefore apply in nonpublic fora as well. The Court should grant Mr. Griffin's petition to clarify *Shuttlesworth*'s application in a nonpublic forum.

CONCLUSION

The Fourth Circuit reached a result-oriented decision directly at odds with this Court's and other circuit precedent.

Petitioner respectfully requests that his petition for writ of certiorari be granted to review the decision of the Fourth Circuit.

Respectfully Submitted,

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May 13, 2002

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 12, 2002

No. 01-1450
CA-00-2837-WMN

PATRICK G. GRIFFIN, III, an individual

Plaintiff - Appellee

v.

DEPARTMENT OF VETERANS AFFAIRS, a Department of the United States Government; ROGER R. RAPP, Acting Under Secretary for Memorial Affairs and Head of the National Cemetery Administration; ROBIN POHLMAN, Director, Point Lookout Confederate Cemetery, an individual, in her official capacity

Defendants - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED thatt the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S Connor
Clerk

B1

PATRICK G. GRIFFIN, III, an individual, Plaintiff-Appellee,

v.

DEPARTMENT OF VETERANS AFFAIRS, a Department of the United States Government; ROGER R. RAPP, Acting Under Secretary for Memorial Affairs and Head of the National Cemetery Administration; ROBIN POHLMAN, Director, Point Lookout Confederate Cemetery, an individual, in her official capacity, Defendants-Appellants.

No. 01-1450

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

274 F.3d 818

October 30, 2001, Argued
December 17, 2001, Decided

LUTTIG, Circuit Judge:

Patrick Griffin brought suit in federal district court to compel the Veterans Administration to permit him to fly the Confederate flag daily over Point Lookout Confederate Cemetery, a national cemetery administered by the Veterans Administration through the National Cemetery Administration. The district court concluded that Griffin's proposed flag display constituted private speech in a nonpublic forum, and held that the Veterans Administration's asserted reasons for excluding this speech were neither reasonable nor viewpoint neutral. Accordingly, the district court enjoined the Veterans Administration to permit Griffin to fly the Confederate flag at

Point Lookout daily, on a flag pole to be erected and maintained by Griffin. Because we hold that the Veterans Administration's denial of Griffin's request is both reasonable and viewpoint neutral, we reverse.

I.

The National Cemetery Administration ("NCA"), part of the Veterans Administration ("VA"), operates 119 national cemeteries, including Point Lookout Confederate Cemetery, which the federal government acquired from the state of Maryland in 1910. Congress requires that all national cemeteries "shall be considered national shrines as a tribute to our gallant dead," 38 U.S.C. § 2403(c), and has delegated to the Secretary of Veterans Affairs authority to make "all rules and regulations which are necessary or appropriate to carry out" this mandate, 38 U.S.C. § 2404(a).

A VA regulation, 38 C.F.R. § 1.218(a), broadly proscribes many forms of expression, absent specific authorization, on all VA property. It prohibits all "demonstrations, except as authorized by the head of the facility." This includes the "display of any placards, banners, or foreign flags," and also "partisan activities." *Id.* The VA supplemented this general regulation with several more specific directives related to flag displays at national cemeteries. Of particular relevance to this case, the VA issued a formal directive, "Flags in VA National Cemeteries" ("Old Flag Manual"), in 1995. J.A. 165-72. A new directive ("New Flag Manual"), issued on April 30, 2001, after the district court decided the case now before us, superseded the Old Flag Manual.

Griffin requested permission to fly an historically accurate Confederate flag over Point Lookout on August 30, 2000, and daily thereafter. J.A. 95-96. The VA refused Griffin's requests, explaining that, although its rules (set forth in the Old Flag Manual) allowed for display of the Confederate flag two days a year, it did not "believe that additional displays of the

Confederate flag at Point Lookout [were] in keeping with the NCA's mission." J.A. 97-98.

Dissatisfied, Griffin brought suit in district court, alleging that the VA's various flag restrictions were facially unconstitutional and unconstitutional as applied to his specific request. Griffin moved for a preliminary injunction, and the VA moved for summary judgment. *See Griffin v. Dep't of Veterans Affairs,* 129 F. Supp. 2d 832, 834 (D. Md. 2001). The district court proceeded directly to a trial on the merits, pursuant to Federal Rule of Civil Procedure 65. *Id.* at 837.

The court concluded that it lacked jurisdiction to hear Griffin's facial attack on 38 C.F.R. § 1.218(a)(14). *Griffin,* 129 F. Supp. 2d at 837 (citing 38 U.S.C. § 502, which allows for judicial review of VA rulemaking, but only in the Federal Circuit). It concluded, however, that it did have jurisdiction over Griffin's challenge to the regulation as applied to his request through the Old Flag Manual. *Id.* at 838.

The district court thereafter held that Point Lookout is a nonpublic forum, *id.* at 839, and that the VA's restrictions were neither reasonable in light of the purpose of the forum nor viewpoint neutral, *id.* at 841-44. Accordingly, the district court entered a permanent injunction, ordering the VA to permit Griffin to fly the Confederate flag daily, using his own equipment and labor. *Id.* at 839 n.9. This appeal followed.

II.

The district court concluded, *Griffin,* 129 F. Supp. 2d at 840, and the parties agree, that Point Lookout is a nonpublic forum. Restrictions on speech in such a forum must be both reasonable in light of the purpose of the forum and viewpoint neutral. *See, e.g., Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.,* 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). As noted, the district court held that the VA's restrictions meet neither requirement. We address each in turn.

n1

n1 Preliminarily, we note that the district court decided this case under the Old Flag Manual. The parties agree, as do we, however, that the appeal is not mooted by the adoption of the New Flag Manual. Griffin claims a constitutional right to his requested display. The New Flag Manual, like its predecessor, provides no mechanism by which Griffin could seek such blanket approval. And the fact that the VA persists in litigating this case confirms that it has no intention of acceding to Griffin's request. Moreover, Griffin's claim, at least before this court, is that 38 C.F.R. § 1.218(a)(14) is unconstitutional *as applied* to him through the Flag Manual, old or new. Because that regulation remains in effect and the VA continues to deny his request, the appeal is not moot. *See Northern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 662, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) ("There is no mere risk that [the VA] will repeat its allegedly wrongful conduct; it has already done so."); *cf. Valero Terrestrial Corp. v. Paige,* 211 F.3d 112 (4th Cir. 2000) (holding that *substantial* statutory revisions mooted case).

A.

In order to assess the reasonableness of the Secretary's restrictions, we must first determine the purpose of Point Lookout, the relevant forum. We agree with the VA that that purpose is to honor, as Americans, in tranquil and nonpartisan surroundings, those who have given their lives to the Nation. We also conclude that the Secretary's restrictions are reasonable both as a means of ensuring the integrity of the VA's own message (which, in this case, coincides with the purpose) and, relatedly, as an effort to maintain the nature of the forum.

1.

The VA contends that the purpose of Point Lookout is to

pay "tribute to [the Confederate soldiers] as citizens of the United States," Appellant's Reply Br. at 7. In confirmation of this purpose, the VA directs us to 38 U.S.C. § 2403(c), in which Congress provided that

> all national [cemeteries] shall be considered *national shrines* as a tribute to *our* gallant dead and, *notwithstanding the provision of any other law*, the Secretary is hereby authorized to permit appropriate officials to fly *the flag of the United States of America* at such cemeteries twenty-four hours each day.

(Emphasis added). Congress' evident concern that such cemeteries "shall be considered *national* shrines" and its focus on "*our* gallant dead," combined with its emphasis on the flying of the "flag of the *United States of America*," all but inexorably lead to the conclusion that Congress did, as the VA maintains, intend national cemeteries to be places in which we honor "our gallant dead" *as Americans*.

Further, to implement and effectuate this statutory mandate, the VA has promulgated various regulations designed to preserve these cemeteries as quiet places in which to honor the American dead, free from controversy and partisan conflict. *See, e.g.*, New Flag Manual (stating that "flags may not be displayed on NCA property as a means of political activity or similar conduct that promotes any particular viewpoint or ideology other than to commemorate military service"); 38 C.F.R. § 1.218(a)(14) (limiting most forms of expression on VA property).

Griffin, not surprisingly, argues that the purpose of Point Lookout is to honor the Confederates buried at the Cemetery *as Confederates* and that the district court made factual findings to that effect, which we may review only for clear error. The district court did note that Point Lookout was "established for

the sole purpose of honoring Confederate dead," *Griffin,* 129 F. Supp. 2d at 842, and went on to state that the proposed positioning of the Confederate flag "simply represents an unpretentious recognition that those who are buried there died as members of the Confederate Army," *id.*

Critically, however, nothing in the district court's opinion rejects or even refutes the VA's position that the purpose of Point Lookout is to honor those Confederate soldiers who are buried there *as Americans*. To say that the purpose is to honor the Confederate dead, as the district court did, is not at all to say that the purpose is not to honor them *as Americans*. That is, even if we assume that the district court's comments amount to findings of fact (and ignore the district's failure to comply with Federal Rule of Civil Procedure 52(a), which requires the court to "find the facts specially and state separately its conclusions of law thereon") we would still conclude, as the VA urges, that the purpose of Point Lookout is to honor, *as Americans*, those who are buried within that cemetery.

Stated another way, the district court's purported findings are simply irrelevant to the disposition of this case. As discussed below, the reasonableness of the VA's restrictions turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans. Griffin insists that it is the former, and the VA insists that it is the latter, but the district court's opinion is silent as to which it is. Because there is no factual finding by the district court on this pivotal distinction to which we must defer, and because the statute compels us to accept the VA's position, we hold that the purpose of Point Lookout is to honor the soldiers buried there *as Americans*. n2

n2 Griffin attempts to support his position by noting that the VA has retained the original name, "Point Lookout Confederate Cemetery." Griffin also points

> to various inscriptions on Point Lookout's monuments, such as "At the call of Patriotism and duty they encountered the perils of the field, endured the trials of a Prison, and were faithful, even unto death," J.A. 157, and "Dulce et decorum est pro Patria Mori." We need not, however, decide whether the name of the Cemetery or its inscriptions could ever determine its purpose for First Amendment analysis, because each of these is consistent with honoring the Confederates buried at Point Lookout *as* Americans.

2.

Griffin asserts, and the district court held, that the VA's restrictions are unreasonable in light of the purpose of the forum. We note at the outset that the VA's restrictions "need only be *reasonable*; [they] need not be the most reasonable or the only reasonable limitations." *Cornelius,* 473 U.S. at 808. We have no trouble concluding that the restrictions meet this deferential test.

The government is entitled to promote particular messages, *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), and to "take legitimate and appropriate steps to ensure that its messages [are] neither garbled nor distorted," *id.*; *see Rust v. Sullivan,* 500 U.S. 173, 194-95, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) ("When the Government appropriates funds to establish a program [that includes speech] it is entitled to define the limits of that program.").

The district court missed the thrust of this argument, stating that the "defendants are not being asked to expend their money or act at all but, rather, merely to 'step back and allow the third parties to use the government property without interference,'" *Griffin,* 129 F. Supp. 2d at 842 (quoting *PMG Int'l Div., LLC v. Cohen,* 57 F. Supp. 2d 916, 920 (N.D. Cal. 1999)). Requiring

the VA to allow the Confederate flag to fly daily over Point Lookout certainly "garbles [and] distorts" the VA's chosen message that "Point Lookout does not commemorate fallen Confederates as such[, but, rather,] ... pays tribute to them *as citizens of the United States* who died in service of the Confederacy during a national conflict." Appellant's Reply Br. at 7 (emphasis added).

The First Amendment does not compel the VA to subsidize Griffin's speech by allowing him to use the federally-owned Cemetery, particularly when that speech undermines the VA's own message. The VA "is not denying a benefit to anyone, but is instead simply insisting that public funds [in the form of use of land] be spent for the purposes for which they were authorized." *Rust,* 500 U.S. at 196.

Griffin next argues that, because the VA permits the Confederate flag to be flown two days a year, the purpose of the forum would best be fulfilled by flying the flag daily. Griffin actually states that in order to avoid this conclusion, "the VA would have to show that diminishing returns set in after two days of display, thereby adding no additional honor and respect to the Confederate dead." Appellee's Br. at 34 & n.5. Even ignoring the fundamental mathematical error, this statement is simply incorrect. There is nothing unreasonable about the VA's decision to accommodate those, like Griffin, who wish to honor the soldiers as Confederates, only twice a year. And, in fact, the two days on which the VA automatically allows the flag to fly are Memorial Day and Confederate Memorial Day. It is not unreasonable to believe that limiting the display to those two days reinforces the VA's objective of honoring "our gallant dead," 38 U.S.C. § 2403(c), without unduly disturbing or distorting the VA's overall message of honoring the dead *as American citizens*.

Perhaps flying the Confederate flag does, as the district court believed, "affirm[ ] the statutory mandate that national

cemeteries shall be 'shrines as a tribute to our gallant dead,'" *Griffin,* 129 F. Supp. at 841 (quoting 38 U.S.C. § 2403(c)), though, as expressed above, we doubt it. But Congress delegated this determination *not* to the district court or to Griffin, but, rather, to the Secretary. We hold that the Secretary's restrictions are reasonable in light of the purpose of Point Lookout.

3.

The district court also rejected the VA's argument that the restrictions were reasonable in light of the VA's desire to preserve the tranquility of national cemeteries. The district court noted that the Confederate flag had flown for several years at Point Lookout (until the VA became aware of it), apparently without incident. And although the district court was "hard put to imagine a rationally thinking person attributing a racial or discriminatory message" to the proposed display, *Griffin,* 129 F. Supp. 2d at 841, certainly the VA could reasonably believe that the Confederate flag *could* cause controversy and that such controversy *could* undermine the VA's goal of keeping the cemeteries free from partisan conflict. The First Amendment does not preclude the VA from taking steps to preserve the nature of this nonpublic forum. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) ("The State, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated.") (quoting *United States Postal Serv. v. Greenburgh Civic Ass'n,* 453 U.S. 114, 129-30, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981)); *id* at 52 n.12 (noting that government need not prove disruptions will occur); *see also International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 685, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992) (ISKCON).

The VA also points to the logical consequences of the district court's holding, worrying reasonably that other groups

would demand that their own flags be flown over the Cemetery. The VA may also have to contend with counterspeech that the Confederate flag encourages. Griffin characterizes this concern as a "baseless scare tactic." Appellee's Br. at 48. But the Supreme Court has counseled that justifications for restrictions "should not be measured by the disorder that would result from granting an exemption solely to" one group. *ISKCON,* 505 U.S. at 685 (internal quotation omitted). Rather, the VA can legitimately consider the probable effects of demands made by other groups.

Griffin seeks to distinguish his speech from possible counter speech. The former, he insists, is compatible with the purpose of the forum, while the latter is not. But this is true only if the purpose of the forum is honoring the Confederate dead as Confederates, a view we have already rejected. Nor is it by any means clear that the First Amendment tolerates favoritism of the kind Griffin apparently advocates. *See, e.g., R.A.V. v. City of St. Paul,* 505 U.S. 377, 392, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992) ("[The VA] has no such authority to license one side of the debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

We conclude that the VA's restrictions are reasonable in light of the nature of this particular forum, a cemetery dedicated to honoring, as Americans, the Nation's war dead.

B.

The district court believed, as Griffin had argued, that the VA's persistent references to the Confederate flag as "a symbol of racial intolerance and divisiveness clearly demonstrate[d] that [the VA is] choosing, and advancing the viewpoint of those offended by the flag over the viewpoint of those proud of the flag." *Griffin,* 129 F. Supp.2d at 843 (citations omitted). While it is not clear that the VA has done any such thing, as discussed above, the VA is allowed to choose sides as far as its own message is concerned.

The only issue is how the VA treats what little private speech it does allow at the Cemetery. The VA argues that the flag restrictions now in place limit private flag displays in national cemeteries without regard to the speaker's viewpoint. Griffin contends that the VA discriminates based on viewpoint, because it "allow [s] a group to display Confederate flags far less than other flags." Appellee's Br. at 51 (noting that viewpoint discrimination occurs "when government seeks to suppress speech because it disapproves of the message or ideas expressed") (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)).

But a review of the New Flag Manual reveals that groups that wish to fly the Confederate flag actually enjoy an *advantage* over other groups. Such groups may fly the Confederate flag two days a year without seeking special permission. *See* New Flag Manual, at P 7.a (included as exhibit to Appellee's Brief). Any further displays of the Confederate flag must be authorized pursuant to paragraph 2.b, but this merely places those wanting *additional* days on which to fly the Confederate flag in the same position as private parties seeking to display any other flag on a given day. n3 Far from demonstrating any special distaste for the Confederate flag, the New Flag Manual expresses, if anything, we suppose, a preference.

n3 Griffin makes much of the fact that the New Flag Manual does not affirmatively prohibit the display of other flags, like the POW/MIA flag, by private parties. This simply misses the structure of the rules laid out in the New Flag Manual. Paragraph 2.b requires that *any* deviation from the default rules must be approved by the appropriate authorities. Paragraph 8.b states that at cemeteries without permanent staffing, such as Point Lookout, the POW/MIA flag flies only on the six days required by statute.

Griffin believes that *R.A.V.* supports his position. But this is not a case in which the government "imposes *special prohibitions* on those speakers who express views on disfavored subjects." *R.A.V.*, 505 U.S. at 391 (emphasis added). If anything, the VA grants groups that wish to fly the Confederate flag *special permission*. It confers a similar advantage on the advocates of no other flag, except the two flags specifically addressed by federal law (the flag of the United States and the POW/MIA flag). On this record, it is not possible to conclude that the VA discriminates against those who seek to display the Confederate flag or even that the VA is motivated by animosity toward that flag.

The district court erred by concluding that the VA discriminates against Griffin's message on the basis of viewpoint. The VA's restrictions are not only reasonable in light of the purpose of the forum, but also viewpoint neutral.

III.

Griffin contends, finally, that we should strike down the New Flag Manual as *facially* unconstitutional, because, among other reasons, it amounts to an unconstitutional prior restraint. But Griffin's facial attack faces several immediate obstacles. Arguably, it fails for the simple reason that the New Flag Manual is constitutional *as applied* to Griffin. *See Rust,* 500 U.S. at 183 (approving of the test announced in *United States v. Salerno,* 481 U.S. 739 (1987), even in the First Amendment context). *But see Grayned v. City of Rockford,* 408 U.S. 104, 114-15, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Next, it is not completely clear that we have jurisdiction over the claim. It is quite possible that the New Flag Manual is an interpretive regulation under 5 U.S.C. § 553, judicial review of which "may be sought only in the United States Court of Appeals for the Federal Circuit." 38 U.S.C. § 502. Finally, the district court did not rule on this. Rather, it held that the *Old* Flag Manual was

unconstitutional *as applied*. *Griffin,* 129 F. Supp. 2d at 844.

At any rate, Griffin's prior restraint claim is meritless. In support of this claim, Griffin musters up a cite to an Eleventh Circuit case, *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1362 (11th Cir. 1999), where the court stated that "statutes may not give public officials 'unbridled' discretion to deny permission to engage in constitutionally protected expression." But the precise form of expression in which Griffin wishes to engage – daily display of a Confederate flag in a nonpublic forum not open to such – is, by definition, *not* constitutionally protected expression. *See Greer v. Spock,* 424 U.S. 828, 838, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976) (finding no First Amendment problem with vesting commanding officer of base with power to exclude civilians seeking to speak); *United States v. Kokinda,* 497 U.S. 720, 729, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality); *see also Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 682-83, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998) (upholding exclusion of candidate from presidential debate, despite lack of procedural protections, because decision was reasonable and viewpoint neutral).

CONCLUSION

For the reasons stated, the judgment of the district court is reversed and the case is remanded with instructions to vacate the injunction and enter judgment for the VA.

REVERSED

C1

PATRICK J. GRIFFIN, III v. DEPARTMENT OF VETERANS AFFAIRS, et al.

Civil Action WMN-00-2837

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

January 30, 2001, Decided

MEMORANDUM

This action is before the Court on Plaintiff's Motion for Preliminary Injunction (Paper No. 3). Defendants have opposed the motion, and have also moved for summary judgment (Paper No. 7). The issues have been fully briefed and a hearing, going both to the request for a preliminary injunction and the merits, was held on November 30, 2000.

I. BACKGROUND

Point Lookout Confederate Cemetery ("Point Lookout"), located in St. Mary's County, Maryland, was the site of the Point Lookout prison camp operated by the United States during the Civil War. Complaint at P9. Point Lookout contains a mass grave of approximately 3,300 Confederate soldiers who died while imprisoned at Point Lookout. *Id.* The grave is marked by an "eighty-five foot granite monument ["Federal Monument"], erected and maintained by the United States." Opp. at 1. Around the base of the Federal Monument are "twelve bronze plaques bearing the names of Confederate Prisoners known to have died at Point Lookout," as well as a bronze plaque indicating, among other things, that the

monument was erected by the United States. Opp. at 6. Point Lookout also contains a smaller state monument. The only other permanent display at Point Lookout is a U.S. flag, which flies on a permanent flagpole at all times, illuminated between sunset and sunrise. Surrounding Point Lookout is a five-foot-high, wrought-iron fence, see Opp. at 5, with a bronze plaque at the entrance identifying the property as "Point Lookout Confederate Cemetery." Motion at 6.

The entrance to Point Lookout is less than 30 feet from a state highway. Both monuments and the U.S. flag are visible from the road, as is the bronze entrance plaque identifying Point Lookout. Approximately eight-tenths of a mile from Point Lookout is the State of Maryland's Point Lookout State Park, which includes a Civil War museum and other attractions. See Opp. at 6.

Point Lookout was the property of the State of Maryland until ownership was transferred to the U.S. government in 1910. Point Lookout is currently owned and controlled by the Department of Veterans Affairs ("VA") through the National Cemetery Association ("NCA"). To facilitate the management of national cemeteries, the VA and NCA have promulgated various regulations regarding the operation and use of such cemeteries, including Point Lookout. These regulations (collectively referred to as the "Flag Restrictions") include 38 C.F.R. § 1.218(a)(14), n1 which addresses demonstrations at VA facilities generally, and the National Cemetery Service Handbook 3220 ("Flag Manual") n2 and a one-page Confederate flag policy ("Flag Policy"), n3 which specifically regulate the display of various flags at VA national cemeteries.

n1 38 C.F.R. § 1.218(a)(14) states in pertinent part:

(a) Authority and rules of conduct. Pursuant to 38 U.S.C. § 901, the following rules and regulations apply to all property

under the charge and control of VA (and not under control of the General Services Administration) and all persons entering in or on such property. The head of the facility is charged with the responsibility for the enforcement of these rules and regulations ...

(14) Demonstrations

(i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee is prohibited....

(ii) For the purpose of the prohibitions expressed in this paragraph, authorized demonstrations or services shall be defined as, but not limited to, ... any oration or similar conduct to assembled groups of people, unless the oration is part of an authorized service; the display of any placards, banners, or foreign flag on VA property unless approved by the head of the facility or designee; ... and partisan activities, i.e. those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise

n2 The relevant portions of the Flag Manual provide:

1. Flag Etiquette and Display

b. Primary flags authorized for public display in national cemeteries are the United States flag, the VA's Distinguishing flag, State flags, the POW/MIA flag and, under limited circumstances, the Confederate flag.

...6. The Flag of the Confederate States of America (CSA)

a. The Flag of the Confederate States of America (CSA) will be displayed in national cemeteries only to represent respect for those decedents who served in the armies of the CSA during the Civil War. As such, the

display of the Confederate flag is limited to ... Memorial Day and, in States where it is officially observed, Confederate Memorial Day.

b. The display of the Confederate flag in national cemeteries is allowed only under the sponsorship of a local service or historic organization....

c. The Confederate flag is to be subordinate to the United States flag in size and prominence of display....

7. The League of Families' POW/MIA flag

a. The official League of Families' POW/MIA flag is authorized for display in national cemeteries. The POW/MIA flag is displayed during daylight hours at all national cemeteries on Memorial Day, Veterans Day and National POW/MIA Recognition Day. The flag may be flown more frequently, or daily, at cemeteries where its display is promoted and supported by local interest groups.

b. The POW/MIA flag is not displayed subordinate to the United States flag....

n3 The Flag Policy restates the Flag Manual's restrictions on the display of Confederate flags.

Plaintiff, a descendant of a Confederate soldier held prisoner at Point Lookout and a member of various confederate historical organizations, including the Sons of Confederate Veterans ("SCV"), n4 sought to display, beginning August 30, 2000, and daily thereafter, between the hours of 9:00 a.m. and 6:00 p.m., a full-sized, historically accurate Confederate flag from its own flag pole at Point Lookout. See August 17, 2000 Griffin Letter. Plaintiff, in his request, states that he, with the assistance of the SCV, will "provide the flag pole and the flag, as well as all labor necessary" to place and remove the flag on a daily basis. *Id.* Plaintiff's request was denied on the ground that the Flag Manual permits display of the Confederate flag "only on Memorial Day and, in States where it is officially

observed, Confederate Memorial Day." August 24, 2000 Pohlman Letter.

n4 The SCV is an organization devoted to the preservation of the history of Confederate soldiers. The SCV supports the daily display of a historically accurate Confederate flag from its own flag pole at Point Lookout. See Motion at 7.

In light of this denial, Plaintiff brought suit seeking declaratory and injunctive relief n5 on the grounds that: (1) the Flag Restrictions, facially and as applied, are improper content and viewpoint restrictions of speech in violation of the First and Fifth Amendments; (2) the Flag Restrictions are unreasonable in the context of Point Lookout; (3) 38 C.F.R. § 1.218(a)(14), facially and as applied, violates the First and Fifth Amendments because it lacks proper procedural safeguards; (4) the Flag Restrictions are unconstitutionally overbroad; (5) the Flag Restrictions, facially and as applied, deny equal protection to speakers who engage in forms of speech related to the Confederate flag; and (6) the portions of the Flag Restrictions imposing different standards on the Confederate Flag, as compared to other "primary" flags, n6 are unconstitutionally vague.

n5 Plaintiff seeks no monetary damages other than that of "reasonable attorneys' fees and costs of suit." Complaint at 14.

n6 Pursuant to the Flag Manual, the primary flags are: the United States flag, the VA's Distinguishing flag, State flags, the POW/MIA flag and, under limited circumstances, the Confederate flag.

Plaintiff then filed his motion seeking a preliminary injunction to prohibit "defendants from interfering with

Plaintiff's display of a full-size, historically accurate Confederate flag at [Point Lookout], on a daily basis, from its own flag pole located near the Federal Monument." n7 Motion at 34. Defendants not only opposed Plaintiff's motion but also moved for summary judgment. Defendants, in their opposition, contend that they are entitled to summary judgment on the following grounds: (1) this Court is without jurisdiction to hear a challenge to the constitutionality of 38 C.F.R. § 1.218(a)(14); and (2) the Constitution does not require the daily display of the Confederate flag at Point Lookout because (i) Plaintiff has no right to require the government to engage in speech and (ii) the government has a compelling interest in avoiding a message of racial intolerance or divisiveness on federal property.

> n7 This request was amended to include Plaintiff's acquiescence to the placement of the flag at "any reasonable location" within Point Lookout, with a preference for a position near either the state or federal monument. Plaintiff's Supplemental Memorandum at 1. Plaintiff also sought to add "a light so that the flag can be flown and made visible at night." *Id.*

A hearing was held on November 30, 2000. Under Fed. R. Civ. P. 65, a hearing on a motion for preliminary injunction may be consolidated with a trial on the merits. At the hearing, the parties went beyond the issues surrounding the necessity of a preliminary injunction and fully addressed the merits of the case. Thus, the Court will proceed directly to the merits.

II. DISCUSSION

A. 38 C.F.R. § 1.218(a)(14)

1. Facial Challenge

Plaintiff asserts that 38 C.F.R. § 1.218(a)(14), on its face,

is an unconstitutional prior restraint on speech because it: (1) vests unlimited discretion in VA officials to prohibit speech; (2) fails to require prompt decisions on requests to "speak"; and (3) improperly places the burden on the speaker to initiate court proceedings to secure the right to speak. See Motion at 17-22. Defendants do not address the merits of Plaintiff's challenge to the regulation; instead, Defendants assert that such a challenge is not properly before this Court as exclusive jurisdiction lies with the Court of Appeals for the Federal Circuit.

Permissibility of judicial review of rules and regulations, such as 38 C.F.R. § 1.218, is governed by 38 U.S.C. § 502. Under section 502, "an action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers ... is subject to judicial review. Such review shall be in accordance with Chapter 7 of title 5 and may be brought only in the United States Court of Appeals for the Federal Circuit." The parties do not dispute that section 553 specifically exempts matters relating to public property, such as Point Lookout, from the purview of section 502. This exemption, however, is negated by the application of section 552(a)(1), which covers rulemaking. See *Chinnock v. Turnage,* 995 F.2d 889, 893 (9th Cir. 1993) (stating that under 38 U.S.C. § 502, VA rulemaking is subject to judicial review only in the Federal Circuit).

In an unpersuasive plea, Plaintiff requests that this Court disregard the statute and exercise jurisdiction in the name of "fairness." See Pl. Reply at 39. The Court is, however, without authority to grant such a request. The statute is clear that "facial constitutional attacks on regulations promulgated by the Secretary may be pursued in one of two ways - either in accordance with the procedure set forth in the Veterans' Judicial Review Act [not applicable here], or directly in the Federal Circuit Court of Appeals as permitted by 38 U.S.C. § 502." *Hall v. U.S. Dep't Veterans' Affairs,* 85 F.3d 532, 534 (11th Cir. 1996).

For the foregoing reasons, the Court holds that the facial constitutional challenge to 38 C.F.R. § 1.218(a)(14) may only be brought in the Federal Circuit Court of Appeals.

2. "As Applied" Challenge

In addition to the facial challenge, Plaintiff also asserts an "as applied" challenge to 38 C.F.R. § 1.218(a)(14). An as applied challenge differs from a facial challenge in that it looks to the constitutionality of the statute or regulation as it is applied to a particular set of circumstances. In addition, the remedy is very different: "If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances ..., but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances." *Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir. 1997), cert. denied, 523 U.S. 1036, 140 L. Ed. 2d 496, 118 S. Ct. 1347 (1998). Here, Plaintiff argues that it is the application of the regulation, via the Flag Manual and Flag Policy, to his specific request that is unconstitutional.

Defendants' counter with the argument that another statute, 38 U.S.C. 7292(d)(1),(2), n8 precludes jurisdiction of this Court over the as applied challenge as well. The Court disagrees. Section 7292 (d)(1),(2) applies only to actions brought under that chapter, i.e., chapter 72, which confers jurisdiction on the Federal Circuit over appeals from decisions of the Court of Veterans Appeals. This case involves no such appeal. Therefore, section 7292(d)(1),(2) is inapplicable.

n8 In pertinent part, 38 U.S.C. § 7292(d)(1),(2) reads:

> The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions.... Except to the extent that an appeal under this chapter presents a

> constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.
> (Emphasis added).

In addition to there being no statutory bar to this Court exercising jurisdiction over the as applied challenge, case law supports the contention that this Court is, in fact, the proper court to hear such a challenge. First, the direct review provisions of section 502 are to be read narrowly. See *Hilario v. Secretary, Dep't of Veterans Affairs,* 937 F.2d 586, 588 (Fed. Cir. 1991). Under the direct review provisions, the Federal Circuit "may review the VA's procedural and substantive rules, any amendments to those rules, and the process in which those rules are made or amended." *Disabled American Veterans v. Gober,* 234 F.3d 682, 688 (Fed. Cir. 2000). Application of a rule is not, however, "rulemaking" to which section 552(a)(1) refers because "rulemaking is legislative in nature, is primarily concerned with policy considerations for the future rather than the evaluation of past conduct, and looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts." *LeFevre v. Secretary, Dep't of Veterans Affairs,* 66 F.3d 1191, 1196 (Fed. Cir. 1995), cert. denied, 517 U.S. 1188 (1996) (citations omitted). See also *Hilario,* 937 F.2d 586 (Fed. Cir. 1991) (holding that section [502] confers no jurisdiction on the Federal Circuit to hear a challenge to the application of a veterans' benefits statute to the facts of a particular claim).

Defendants' denial of Plaintiff's request was not, however, based directly on 38 C.F.R. § 1.218(a)(14). Instead, the decision to deny the request cited the Flag Manual and Flag Policy, see Aug. 24, 2000 Pohlman Letter and Aug. 28, 2000 Rapp Letter, which are based, in part, on 38 C.F.R. § 1.218(a)(14). See Flag Policy. Therefore, 38 C.F.R. § 1.218(a)(14) will be addressed only to the extent necessary to

evaluate Defendants' actions under the Flag Manual and Flag Policy.

B. Flag Manual and Flag Policy

The issue presented is whether Plaintiff has a First Amendment right to fly a Confederate flag at Point Lookout. In *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985), the Supreme Court outlined the appropriate framework for analyzing an alleged First Amendment infringement. First, the court must decide whether the speech at issue is speech protected by the First Amendment. If it is, the court must then "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Finally, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.* at 797. Applying this analysis, this Court finds that Plaintiff's speech is protected speech occurring in the context of a nonpublic forum and that Defendants' reasons for excluding the speech fail to satisfy either the reasonableness or view-point neutrality requirements. Accordingly, Plaintiff's request for Declaratory and Injunctive Relief will be granted. n9

> n9 The form of relief granted is that Plaintiff shall be permitted to display, on a daily basis between the hours of 9:00 a.m. and 6:00 p.m., a full-sized, historically accurate Confederate battle flag from its own pole at Point Lookout. The pole shall be at least three feet lower than the U.S. flagpole at Point Lookout. The placement of the flag is to be agreed upon by the parties but in close proximity to either the Federal or State monument. Plaintiff is to provide all material and labor necessary for the daily placement and removal of the flag. A sign shall be erected at the base of the flag pole clearly indicating

that the display of the Confederate flag is provided by and supported by a private party or parties.

1. Display of Flag is Protected Speech

The first issue is whether the speech at issue, here the display of the Confederate flag, is the type of speech protected by the First Amendment. Defendants do not contest this issue. Flags have long been recognized as "a form of symbolism comprising a primitive but effective way of communicating" worthy of protection by the First Amendment. *Spence v. State of Washington,* 418 U.S. 405, 410, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974). See also *Texas v. Johnson,* 491 U.S. 397, 404-06, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989); *Sons of Confederate Veterans, Inc. v. Glendening,* 954 F. Supp. 1099, 1102 (D. Md. 1997) (reiterating that "flags and other symbols are entitled to First Amendment protection as a variant of speech").

2. Forum Analysis

Whether or not the Flag Manual and Flag Policy are valid restrictions on Plaintiff's speech depends, first, on whether Point Lookout is a traditional public forum, a designated public forum, or a nonpublic forum. n10

> n10 Alternatively, Defendants assert that Point Lookout is actually a non-forum and, therefore, restrictions on speech are valid as long as they are not "arbitrary, capricious, or invidious." Opp. at 19. Defendants, however, provide no case law in support of this assertion; and it is noted that Defendants themselves have opened national cemeteries, including Point Lookout, for some, albeit limited, forms of speech.

Traditional public fora are places which "by long tradition or government fiat have made devoted to assembly and debate." *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460

U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Examples include places such as public streets, sidewalks, and parks. A restriction on speech in traditional public fora must withstand strict scrutiny, *i.e.*, the restriction must be narrowly tailored to effectuate a compelling government interest. See *Id.* Point Lookout is undisputedly not a traditional public forum.

A designated public forum is created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Id.* The factors used to determine whether the government's intent was to "designate" a place as a public forum include: (1) the policy and practice of the government; (2) the nature of the property; (3) its compatibility with expressive activity; and (4) the extent of the use granted. See *Cornelius,* 473 U.S. at 802; *Claudio v. United States,* 836 F. Supp. 1219, 1224 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994) (citations omitted). Restrictions on speech in a designated public forum must also satisfy the strict scrutiny standard. *Perry,* 460 U.S. at 46.

A nonpublic forum is public property which is not by tradition or designation a forum for public communication. "Merely allowing some speech on property that is not a traditional public forum does not automatically create a designated forum." *Warren v. Fairfax County,* 196 F.3d 186, 193 *(4th Cir. 1999).* Rather, the "government may retain nonpublic forum status by allowing selective, permission-only access to the forum." *Id.* Examples of nonpublic fora include prisons and military bases.

In a nonpublic forum, restrictions on speech are subject to the reasonableness test. Under this test, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806. See also *United States v. Kokinda,*

497 U.S. 720, 730, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (articulating that restrictions on speech in a nonpublic forum "must be reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

Plaintiff asserts that national cemeteries in general and Point Lookout in particular are designated public fora because Defendants have made the cemeteries generally available to classes of speakers, including those who wish to display flags. Defendants counter with the argument that Point Lookout is a nonpublic forum because, outside of the daily display of the U.S. flag and the display of the POW/MIA flag on days designated by statute, n11 the only form of private expressive activity permitted at Point Lookout is the annual 90-minute ceremony held by the SCV. According to Defendants, the dispositive issue is not what could take place at Point Lookout, but what, in fact, does take place. While the Court allows that this is an important factor, it is not the only factor. After taking the other factors into consideration, the Court agrees with Defendants that Point Lookout is a nonpublic forum.

> n11 Technically, the display of the U.S. flag is a nonfactor because it constitutes government, not private, speech. Additionally, because the POW/MIA flag, at Point Lookout, is displayed only on the days designated by statute, it too constitutes government, not private, speech. If the POW/MIA flag were, instead, displayed daily with the support of a local organization, then it would be private speech.

Of primary importance is the fact that Point Lookout, and national cemeteries in general, are not "generally available." Instead, those who wish to display a flag outside of the limited number of specified days must seek permission to do so. The same is true of a party desiring to engage in some other form of expressive activity, such as the annual SCV ceremony. By

limiting expressive activity to "selective, permission only access" the VA may retain nonpublic forum status for Point Lookout, as well as all other national cemeteries. The designation of Point Lookout as a nonpublic forum is also supported by the fact that the nature of the property is not compatible with expressive activity. "It certainly cannot be said that cemeteries have traditionally been used for assembly and the free exchange of ideas. The primary purpose of cemeteries is not to facilitate the free exchange of ideas but, rather, to provide a place for citizens to bury and honor their dead." *Warner v. City of Boca Raton,* 64 F. Supp. 2d 1272, 1291 (S.D. Fla. 1999).

Having determined that Point Lookout is a non-public forum, the restrictions on the requested display of the Confederate flag will be upheld only if they are reasonable in light of the purpose served by the forum and are viewpoint neutral.

3. Reasonableness Requirement

A valid restraint on speech in a nonpublic forum must be reasonable, with reasonableness measured in the context of the purpose served by the forum. See *Cornelius,* 473 U.S. at 806.

Defendants' argument that their actions are reasonable is two pronged: first, that the refusal is reasonable given Defendants statutory responsibility to preserve Point Lookout, and all national cemeteries, as "national shrines" and, second, that the refusal is also reasonable given the government's interest in avoiding any perception that the government endorses or condones racial intolerance or discrimination. Plaintiff attacks both contentions with the simple rebuttal that Point Lookout's sole purpose is to honor Confederate dead and that the flying of the Confederate flag in that context is inherently reasonable.

a. National Shrine Argument

38 U.S.C. § 2403(c) mandates that all national cemeteries "shall be considered national shrines as a tribute to our gallant dead." Pursuant to this statute, Defendants argue that their opposition reasonably seeks to preserve the tranquility and dignity of Point Lookout by prohibiting conduct that might create controversy or invite conflict. See Def. Reply at 12. There are two primary flaws in this argument. First, Defendants have provided no evidence that the display will create controversy or disrupt the tranquility and dignity of Point Lookout. The record, in fact, refutes any such concern as the Confederate flag was flown daily at Point Lookout for almost four years n12 without any complaints, protests or conflicts. Defendants do not dispute that there were no complaints during this time period. Rather, Defendants focus on the fact that the daily display was not authorized by the VA but was, instead, "attributable to the ultra vires action of a Veterans Affairs employee." Def. Reply at 11. The genesis of the display, however, does not alter the fact that for four years the display was not objected to by passers-by, the very group that Defendants now claim will be offended.

n12 The Confederate flag was flown daily at Point Lookout between 1994 and May, 1998.

Second, Defendants overlook that the flying of the Confederate flag in an all Confederate cemetery affirms the statutory mandate that national cemeteries shall be "shrines as a tribute to our gallant dead." See 38 U.S.C. § 2403(c). Given the discrete context of Plaintiff's proposed display, along with the absence of any complaints during the prior years encompassing a similar display, one is hard put to imagine a rationally thinking person attributing a racial or discriminatory message to it.

b. Government Speech Argument

First, Defendants argue that the First Amendment is not applicable because the "speaker" is the government and the First Amendment protects only private expression. See *Serra v. U.S. General Services Admin.,* 847 F.2d 1045, 1048 (2nd Cir. 1988). In support of this contention, Defendants cite several cases, including Serra and *PMG Int'l Div., LLC v. Cohen,* 57 F. Supp. 2d 916 (N.D. Cal. 1999). These cases, however, are not apposite to the issues here.

In *Serra*, the Second Circuit held that the government's removal of a government owned sculpture from federal property did not violate the artist's First Amendment rights. The Second Circuit stated that the purpose of the First Amendment is to protect private, not governmental, expression. Therefore, nothing precludes the government from controlling its own expression or that of its agents. *Serra,* 847 F.2d at 1048. The Second Circuit went on to say that the artist "relinquished his own speech rights" when he sold the sculpture to the government; had the artist wanted to retain some control over the placement of the sculpture, he could have bargained for those rights. *Id.* at 1049.

Similarly, in *PMG Int'l,* a magazine publisher asserted that his First Amendment rights had been violated by the government's refusal to purchase and resell "adult" magazines at a military exchange. The District Court held that the government has a right to decide what it is going to purchase and disseminate and that the First Amendment places no limitations on that right. *PMG Int'l,* 57 F. Supp. 2d at 919.

In *Serra* and *PMG Int'l,* the government was the actor and owner of the real and personal property at issue. Conversely, in the present case, Defendants are not being asked to expend their money or to act at all but, rather, merely to "step back and allow the third parties to use the government property without interference." *PMG Int'l,* 57 F. Supp. 2d at 920. The issue in the present case involves private speech on government

property, which implicates the protections provided by the First Amendment.

Defendants argue, alternatively, that, if the speech is private expression, their actions are nonetheless reasonable because the speech in question would be perceived as government speech. Therefore, Defendants have an interest in avoiding the perception that the government condones or advances racial intolerance or divisiveness. In making this argument, Defendants rely heavily on *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989).

In *Allegheny,* the Supreme Court held that the display of a creche on the interior grand staircase of the Courthouse was unconstitutional because the display has the impermissible effect of indicating government endorsement of religion, in violation of the Establishment Clause. In making this determination, the Court indicated that the primary question is that of "what viewers may fairly understand to be the purpose of the display." *Id.* at 595. That inquiry, of necessity, turns upon the context in which the contested object appears. *Id.* The Court also looked at the prominence of the contested object in the display, see *Id.* at 580-81, 617, and whether something in the context of the display detracts from the possible prohibited message. *Id.* at 598. In *Allegheny,* the Court found: (1) that in the context of the grand staircase, viewers could reasonably perceive the display as the government's endorsement of religion; (2) that the government added to and enhanced the display, thus adding to the perception that the display was sponsored by the government; (3) that there was nothing in the context of the display to detract from the prohibited message, *i.e.,* government endorsement of religion; and (4) that the creche was the dominant element of the display. Lastly, the Court held that the presence of a sign indicating that the creche had been donated by the Holy Name Society was insufficient

to negate the perception of government endorsement of religion because the Establishment Clause "also prohibits the government's support and promotion of religious communications by religious organizations." *Id.* at 600.

Defendants' reliance on *Allegheny* is misplaced. The facts and circumstances of the present case distinguish it from *Allegheny* in several ways. First, the present case does not involve religion or religious speech. Therefore, the broad sweep of the Establishment Clause is not implicated. Second, the context of the display militates against any potential that a prohibited message of racial intolerance could be inferred. As already noted, in the context of a Point Lookout, a cemetery established for the sole purpose of honoring Confederate dead, the only rational assumption is that the flag is being displayed because it is the flag under which those buried at Point Lookout fought and died. Additionally, the proposed subordinate positioning of the Confederate flag to the U.S. flag and its positioning in the shadow of the other monuments, simply presents an unpretentious recognition that those who are buried there died as members of the Confederate Army. See *Id.* at 617 (holding that Chanukah Menorah outside City-County building was in the shadow of other items and, therefore, was not impermissible under the Establishment Clause). Lastly, in the present case, a prominently displayed sign stating that the Confederate flag is provided and supported solely by the efforts of private citizens should remove any vestige of concern that someone might interpret the display as inappropriate government speech. In *Allegheny,* the Court did not say, as Defendants appear to argue, that a sign was never adequate, only that in the circumstances of the Establishment Clause and the particular context at issue, a sign was not sufficient to negate the appearance of government endorsement of religion.

4. Viewpoint Neutrality Requirement

"Regardless of the type of forum, any governmental

regulation of speech must be viewpoint-neutral." *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997). The existence of reasonable grounds for limiting access to a nonpublic forum "will not save a regulation that is in reality a facade for viewpoint based discrimination." *Cornelius*, 473 U.S. at 811. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Sons of Confederate Veterans*, 954 F. Supp. at 1104 (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)). In all cases, the appropriate focus of the viewpoint inquiry examines whether the proposed speech is "otherwise permissible" in a given forum. *Sons of Confederate Veterans*, 954 F. Supp. at 1103.

Defendants argue that their decision was not an attempt to stifle a particular viewpoint but was, rather, based on the desire to prevent disruption of the reverence and decorum of national cemeteries and to avoid any perception that the government itself expresses a viewpoint. Conversely, Plaintiff asserts that the Flag Restrictions are viewpoint based and that the suppression of the Confederate flag is a suppression of a particular viewpoint attributed to the Confederate flag by Defendants. The Court agrees.

Defendants argument undercuts its claim that the decision to deny Plaintiff's request was viewpoint neutral. The Confederate flag does not represent the same thing to everyone. As Judge Smalkin of this Court recently observed:

> There are citizens of all races who view the flag as a symbolic acknowledgment of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying principles of

> discrimination, segregation, white supremacy, and rebellion. Still other citizens either have no knowledge of the flag's ... [history] or have no interest in it.

Sons of Confederate Veterans, 954 F. Supp. at 1103 (quoting *Coleman v. Miller,* 912 F. Supp. 522, 530 (N.D. Ga. 1996)). Yet, Defendant's continual reference to the Confederate flag as a symbol of racial intolerance and divisiveness, see, e.g., Opp. at 16, 29, 30, 33; Def. Reply at 1, 12, 13, 15, clearly demonstrates that Defendants are choosing, and advancing, the viewpoint of those offended by the flag over the viewpoint of those proud of the flag. See *Sons of Confederate Veterans,* 954 F. Supp. at 1103-04. This preference is not viewpoint neutral and is, therefore, impermissible. See *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 391, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992) (stating that the "First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects").

Additionally, regulations that strike at an entire class of viewpoints, such as those here, have been repeatedly rejected. See *Rosenberger v Rector & Visitors of University of Virginia,* 515 U.S. 819, 831-32, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); *Sons of Confederate Veterans,* 954 F. Supp. at 1103. The rationale is that such broad-based regulations are often simply a mask for viewpoint discrimination. See *Sons of Confederate Veterans,* 954 F. Supp. at 1103. Here, Defendants have prohibited all viewpoints related to the display of the Confederate flag. The fact that Defendants repeatedly refer to the Confederate flag as a symbol of racial divisiveness and intolerance illustrates that the regulations are an attempt to regulate speech that Defendants find offensive. Such censorship on the part the government is impermissible under

the First Amendment.

5. Content-Based Restrictions

The government argues that the Flag Manual and Flag Policy are permissible time, place, and manner restrictions. However, content-based time, place, and manner restrictions are presumptively invalid. *R.A.V.,* 505 U.S. at 382. Such restrictions must be narrowly drawn to effectuate a compelling state interest. *Perry,* 460 U.S. at 46.

The restrictions on the Confederate flag are not content-neutral because they treat the Confederate flag differently than other flags, such as the POW/MIA flag. The Flag Manual permits the POW/MIA flag to be displayed daily at Point Lookout, or any other national cemetery, with the support of a local interest group. See Flag Manual at § 7(a). This is true even if the POW/MIA flag has no contextual relationship to the forum, such as if it were flown daily at Point Lookout. Yet, under the same Flag Manual, as well as under the corresponding Flag Policy, a local interest group is not permitted to display the Confederate flag at Point Lookout on a daily basis - even though the very purpose of Point Lookout is to honor the Confederate dead. The only difference between the Confederate flag and the POW/MIA flag is what each flag symbolizes in the eyes of Defendants. Thus, the Flag Manual and Flag Policy, as applied to the Confederate flag in the context of Point Lookout, are impermissible content-based restrictions in violation of the First Amendment.

III. CONCLUSION

For the foregoing reasons, an Order will issue granting Plaintiff's request for declaratory and permanent injunctive relief. Because this would appear to resolve all issues pending in this litigation, this Order will be a final order.

/s/
William M. Nickerson
United States District Judge

Dated: January 30th, 2001

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 30th day of January 2001, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion for Preliminary Injunction (Paper No. 3) is hereby GRANTED;

2. That Defendants' Motion for Summary Judgment (Paper No. 7) is hereby DENIED;

3. That Defendants are permanently enjoined from interfering with Plaintiff's display of the Confederate battle flag under the conditions set forth in the accompanying Memorandum;

4. That this case is hereby CLOSED;

5. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

6. That the Clerk of the Court shall transmit copies of

the foregoing memorandum and this order to all counsel of record.

/s/
William M. Nickerson
United States District Judge

Department of Veterans Affairs
Washington, DC 20420

NCA DIRECTIVE 3220
Transmittal Sheet
April 30, 2001

FLAGS IN VA NATIONAL CEMETERIES

1. REASON FOR ISSUE: To revise National Cemetery Administration (NCA) policy for displaying flags in Department of Veterans Affairs (VA) National Cemeteries.

2. SUMMARY OF CONTENTS: This directive prescribes policy related to:

   a. Displaying, handling, storage and disposition of flags in VA National Cemeteries.

   b. Clarification on displaying the Flag of the Confederate States of America (CSA).

   c. Displaying the National League of Families POW/MIA Flag (POW/MIA flag).

   d. Display of a Confederate flag as specified in the Order of the United States District Court for the District of Maryland, in Griffin v. Department of Veterans Affairs, et al., No. WMN 00-CV-2837 (Jan. 30, 2001). (Note: Appeal filed on March 28, 2001.)

3. RESPONSIBLE OFFICE: NCA, Office of Field

Programs (401A). 810 Vermont Avenue, NW, Washington, DC 20420, is responsible for the material contained in this directive.

4. RELATED HANDBOOK: NCA Handbook 3220, Flags in VA National Cemeteries, dated April 30, 2001.

5. RECISSION:

a. NCS Directive 3220, Flags in VA National Cemeteries, dated April 21, 1995.

b. NCS, Office of Field Operations Policy Letter, POW/MIA Flag Policy, dated July 10, 1998.

Roger R. Rapp
Acting Under Secretary
for Memorial Affairs

Distribution: RPC
FD

APRIL 30, 2001 NCA DIRECTIVE 3220

FLAGS IN VA NATIONAL CEMETERIES

1. PURPOSE: This directive states the Department of Veterans Affairs (VA's) National Cemetery Administration's (NCA's) policy concerning the display of flags in national cemeteries under its jurisdiction. This policy was previously contained in National Cemetery System (NCS) Directive 3220, Flags in VA National Cemeteries, dated April 21, 1995, which has been superceded and is hereby rescinded. This directive is intended to assist NCA field facilities' staff in fulfilling NCA's duty to honor those buried within its national cemeteries by maintaining the final resting places of America's veterans, and their dependents, as national shrines. The statutory authority for this directive is title 4, United States Code; title 36, United States Code, Sections 307 and 512, title 38, and United States Code, Sections 2400 through 2404. Other authorities are found in title 38, Code of Federal Regulations, Sections 1.9, 1.10, and 1.218(a)(14).

2. POLICY

a. This directive describes NCA's policy of demonstrating appropriate respect in the display, handling, storage, and disposition of flags in national cemeteries. To that end, flags may not be displayed on NCA property as a means

for political activity or similar conduct that promotes any particular viewpoint or ideology other than to commemorate military service. The terms "National Cemetery and National Cemeteries" are understood to mean property under the jurisdiction of VA's National Cemetery Administration. This property includes all land acquired under the National Cemeteries Act of 1973, Public Law 94-43, and all property later acquired by NCA for purposes of interment and/or memorialization of veterans and their eligible dependents.

b. Deviation from NCA policy expressed in this directive is not authorized unless approved in writing by the NCA Deputy Under Secretary for Operations. The Cemetery Director has the authority to deny request for such deviation that are not in keeping with NCA's mission and the purpose of the cemetery or, in appropriate cases, recommend to the Deputy Under Secretary for Operations through the Memorial Service Network (MSN) Director that the request be approved. Such request for approval will be submitted in writing by the Cemetery Director at least fourteen (14) days before the proposed display or event will take place. Requests of this nature will be acted on within five (5) business days following receipt by the Deputy Under Secretary for Operations. The decision of the Deputy Under Secretary for Operations on such matters is final.

c. Flags authorized for public display in VA National Cemeteries are the United States of America flag, VA's distinguishing flag as described in 38 CFR Section 1.9(e), State flags (as part of an official ceremony attended by a

senior State official), the National League of Families POW/MIA flag (as authorized in 36 U.S.C. Section 902) and, under circumstances specified in paragraph 7 of this directive, a flag associated with the former Confederate States of America.

d. Certain other flags, pennants and guidon banners may be displayed at the discretion of the Cemetery Director for special occasions so long as they commemorate honorable military service and are not intended to promote any particular viewpoint or ideology other than the wish to commemorate military service. Examples of such flags are the medal of Honor flag, the Buffalo Soldiers' guidon, military ship and unit flags (which are often displayed at wreath laying ceremonies), Senior official and General Officer flags (usually displayed during an official visit), and flags commemorating national historical events.

e. Flags of Veterans Service Organizations granted congressional charters or recognized by VA under 38 CFR Section 14.628 and Military Departments may be appropriately displayed on special occasions. Such flags may also be placed in the administration building, along with the flag of the United States of America.

f. Foreign National flags may be displayed during a visit by a Head of State of a foreign government as part of an official ceremony attended by the Head of State, or during a visit by members of an official delegation of a foreign government to the United States. The graves of foreign citizens and/or prisoners of war may be decorated with their respective National flag for authorized ceremonies or

special activities conducted by their countrymen, descendants, or foreign government officials. For guidance concerning ceremonies and special events in VA National Cemeteries see the NCA Manual M40-2, Chapter 11, Ceremonies and Special Activities, dated May 1, 1984, and any superceding issuances.

g. The Cemetery Director may revoke any organization's authorization to display a flag if the organization's conduct is not in keeping with NCA's responsibilities to maintain the integrity or decorum of the cemetery. Such a decision will only occur after notice to the sponsoring organization and approval by the Deputy Under Secretary for Operations.

3. UNITED STATES OF AMERICA FLAG

a. Each VA National Cemetery will display an all-weather United States of America flag on the main flagpole each day of the year during the hours the cemetery is open, but not to exceed the hours of daylight. Cemeteries having an appropriately illuminated flagpole may display the flag during non-daylight hours so long as the flag is illuminated between the hours of sunset and sunrise.

b. VA National Cemetery personnel will display the flag of the United States of America on Memorial Day at half-staff until noon, at which time it will be raised to full staff. The flag may also be flown at half-staff when otherwise authorized (see 4 U.S.C. Section 7(m)) or by Presidential proclamation to commemorate the death of distinguished citizens, or each December 7 in honor of the individuals who died as a result of their service at Pearl Harbor (Pub.

L. 103-308).

c. VA National Cemetery personnel will bring the flag of the United States of America to half staff one-half hour before the start of the first committal service and raise it to full staff one-half hour after the conclusion of the last committal service each day.

d. No other flag will be routinely displayed subordinate to the United States of America flag on the main flagpole.

4. MEMORIAL FLAGS

a. Eligibility for and disposition of the flag of the United Stats of America for burial purposes is governed by 38 CFR 1.10.

b. VA National Cemetery Directors will ensure that caskets and urns containing the remains of eligible veterans delivered to a VA National Cemetery for burial are accompanied by a United States of America flag. This flag will be appropriately displayed during the committal service, unless the primary next of kin or, if none, the party responsible for the burial wishes otherwise.

5. AVENUE OF FLAGS

a. An "Avenue of Flags" consists of many United States of America flags arrayed on both sides of the principal drive of the main entrance into a VA National Cemetery. In newly constructed VA National Cemeteries the Avenue of Flags is the primary display of respect for the service

performed by our Nation's veterans, and may replace the decorating of individual graves with flags on Memorial Day, Veterans Day or other days of national significance.

b. Where Avenues of Flags are authorized and implemented, they are displayed on Memorial Day, Veterans Day and other days of national significance such as Flag Day and Independence Day when weather permits. The wishes of local service and civic organizations should be considered in determining on which special occasions to display the Avenue of Flags.

6. GRAVE DECORATING FLAGS.

a. At many VA National Cemeteries, each grave is decorated with a small United States of America flag on memorial Day. This practice will be continued at these cemeteries except where substitution of an Avenue of Flags is favored by the local veteran community and discontinuation would not impact negatively on NCA or the cemetery. Discontinuance of the practice of decorating graves with individual flags may be implemented only with the prior approval of the Deputy Under Secretary for Operations, and with the involvement of interested NCA offices and staff, such as the Office of Field Programs and NCA's Communications Management Service.

b. Grave decorating flags will be displayed only during the Memorial Day period each year. A Grave Decorating Flag Program is not required at newly constructed VA National Cemeteries or at cemeteries where display of the Avenue of Flags is the traditional method of displaying United

States of America flags on Memorial Day.

c. For decoration of the graves of Confederate veterans, refer to paragraph 7 below.

7. FLAGS OF THE FORMER CONFEDERATE STATES OF AMERICA

a. A flag of the former Confederate State of America (CSA), such as the Confederate battle flag, may be displayed in VA National Cemeteries only to honor the memory of those who served in the armies or navy of the CSA during the Civil War. Display of Confederate flags on NCA property is limited to displays by a sponsoring organization and to display on Memorial Day and Confederate Memorial Day (in cemeteries in those States that recognize a Confederate Memorial Day). In addition, in States that do not have a Confederate Memorial Day, display of the Confederate flag is authorized on one other day. That day shall be the "ceremonial day" previously recognized by NCA as the annual day when the Confederate flag may be displayed under the sponsorship of a historical or service organization to honor the memory of Confederate veterans interred in that facility. An organization that wishes to establish a ceremonial day in lieu of a Confederate Memorial Day, at a NCA facility where one does not already exist, must follow the process set out in paragraphs 2.b. and 7.c., and be granted permission under the applicable provision prior to conducting such a ceremony. Only one ceremonial day may be approved per facility. Once such a day is authorized, an organization that subsequently seeks involvement in displaying the

Confederate flag at that facility will be encouraged to contact the organization previously granted approval to display the Confederate flag on the ceremonial day to discuss possible participation in activities occurring on that day.

b. The confederate flag(s) will be displayed as follows:

(1) The VA National Cemeteries where Confederate veterans are interred in individual graves, small individual Confederate grave flags may be placed on each grave on the day(s) identified in paragraph 7.a.

(2) At VA National Cemeteries where Confederate veterans are buried in mass graves, the Confederate flag may be displayed on a separate flagpole that is subordinate to the main flagpole on the day(s) identified 7.a.

c. To permit broad participation on the two days identified in paragraph 7.a. display of a Confederate flag is permitted only under the sponsorship of a historical or service organization. Such display may occur only on the two days identified above, unless an exception has been granted as stated in paragraph 2.b. of this directive. To initiate a request to display the flag on either or both of the days identified in paragraph 7.a. the sponsoring historical or service organization must submit a request in writing thirty (30) days in advance of the proposed display, and provide details concerning the proposed display. The Cemetery Director will respond to the request within ten (10) working days of receipt of the request. Once initial display has been

approved, a Confederate flag may be displayed by the sponsoring organization on the approved day(s) on an annual basis.

d. Requests to permit the display of a Confederate flag on NCA property, on a one-time basis as part of an approved ceremony or special activity on days other than the two days identified in paragraph 7.a will be considered on an individual basis. Such request should be submitted in writing to the Cemetery Director for consideration at least thirty (30) days in advance of the proposed ceremony. The Cemetery Director will respond to such request with ten (10) working days upon receipt of the request. Guidance on ceremonies and special activities on NCA property is contained in NCA Manual M40-2, Chapter 11, dated May 1, 1984, or any superceding issuances.

e. The stock of Confederate flags used for display in VA National Cemeteries and on NCA property will be maintained through donation by the sponsoring organization. Confederate flags may not be purchased with Government funds. The sponsoring organization will supervise the placement and removal of Confederate flags without cost to the United States. The sponsoring organization is responsible for the storage of Confederate flags. However, the cemetery director may, as a courtesy to the sponsoring organization, agree to store such flags if space is available and their storage does not result in any additional burden or cost to NCA.

f. The Confederate battle flag may fly on a daily basis from 9 a.m. to 6 p.m. at Point Lookout Confederate Cemetery as

specified by the Order of the United States District Court for the District of Maryland, in Griffin v. Department of Veterans Affairs, et al., No. WMN 00-CV-2837 (Jan. 30, 2001). (Note: Appeal filed on March 28, 2001.) Consistent with that order, the flagpole, flag, maintenance, and the raising and lowering of the flag, are the responsibility of private parties.

8. THE NATIONAL LEAGUE OF FAMILIES POW/MIA FLAG

a. The National League of Families POW/MIA Flag (POW/MIA flag) is the congressionally designated symbol of the Nation's concern to resolve the fates of Americans taken prisoner, or missing in action, and who remain unaccounted for (36 U.S.C. Section 902(a)). See also Memorandum of the Secretary of Veterans Affairs on "Display of POW-MIA Flag," (July 23, 1998). As stated in 38 U.S.C. Section 902(b), the display of the POW/MIA flag on the days and locations specified by Congress serves two purposes:

(1) It serves as a symbol of the Nation's commitment to achieve the fullest possible accounting of Americans who, having been prisoners of war or missing in action, remain unaccounted for.

(2) It serves as the symbol of the Nation's commitment to achieve the fullest possible accounting of Americans who in the future may become prisoners of war, missing in action, or otherwise be unaccounted for as a result of hostile action.

b. In keeping with NCA's continuing mission of commemorating the service of the Nation's veterans, the POW/MIA flag will be flown daily at all VA National Cemeteries and other NCA property staffed by NCA personnel. At VA National Cemeteries and NCA property that are not daily staffed, the POW/MIA flag will be flown on the six days required under 36 U.S.C. Section 902(c). The six days are:

(1) Armed Forces Day, the third Saturday in May;
(2) Memorial Day, the last Monday in May;
(3) Flag Day, June 14;
(4) Independence Day, July 4;
(5) National POW/MIA Recognition Day (although this day is not defined in statute, it has traditionally been the third Friday in September); and
(6) Veterans Day, November 11.

c. Consistent with the requirement at 36 U.S.C. Section 902(f) that the POW/MIA flag "be displayed in a manner designed to ensure visibility to the public," the POW/MIA flag will be displayed on a separate flagpole erected in a location to exhibit appropriate respect for the flag unless circumstances make display on a separate flagpole impractical.

9. RESPONSIBILITIES

NCA, Office of Field Programs, will ensure that individual MSN Directors and VA National Cemetery Directors understand their responsibilities pertaining to display and handling of flags in VA

National Cemeteries.

10. REFERENCES

a. Title 4, United States Code, Federal Flag Code.

b. 36 U.S.C. Section 902, The National League of Families' POW/MIA Flag.

c. Public Law 103-308, National Pearl Harbor Remembrance Day.

d. 38 CFR 1.9, The Department of Veterans Affairs Official Seal and Distinguishing Flag.

e. 38 CFR 1.10, The United States Flag for Burial Purposes.

f. 38 CFR 1.218, Security and Law Enforcement at VA Facilities.

g. NCA Manual M40-2, Chapter 11 (May 1, 1984), Ceremonies and Special Activities, and any superceding issuances.

h. Memorandum of the Secretary of Veterans Affairs to Under Secretaries of Health, Director, National Cemetery System, and Assistant Secretary for Human Resources and Administration, "Display of POW-MIA Flag." (July 23, 1998).

Department of Veterans Affairs
Washington, DC 20420

NCS Directive 3220
Transmittal Sheet
April 21, 1995

FLAGS IN VA NATIONAL CEMETERIES

1. REASON FOR ISSUE: To establish National Cemetery System (NCS) policy for displaying flags in VA national cemeteries.

2. SUMMARY OF CONTENTS: This directive prescribes policy related to the display, handling, storage and disposition of flags in national cemeteries.

3. RESPONSIBLE OFFICE: The Office of Field Operations (401), NCS, is responsible for the material contained in this directive. The cemetery directors are responsible for carrying out the procedures contained in the related handbook.

4. RELATED HANDBOOK: NCS Handbook 3220, Flags in VA National Cemeteries.

5. RESCISSIONS.

   a. NCS M40-2, National Cemeteries - Administration, Operation and Maintenance, dated May 1, 1984, paragraphs:

      (1) 3.05 - U.S. Flag and Cemetery Flag Pole

      (2) 6.07 - Interment Flag

(3) 11.04 - Memorial Day Grave Decorating Flags

(4) 11.09 - Avenue of Flags

(5) 22.12 - Issuance of United States Flags Authorized for Burial or Memorial Purposes

b. NCS Administrative Issues:

DMA Circular 40-79-03 - Issuance of United States Flag for Burial or Memorial Purposes, May 7, 1979

c. NCS Policy Letters:

(1) Quality Control of Interment Flags, October 1, 1990

(2) United States Flags in the National Cemetery System, July 1, 1991

(3) Flying of the POW/MIA Flag in National Cemeteries, July 6, 1992

(4) Display of the POW/MIA Flag in National Cemeteries, October 7, 1992

Jerry W. Bowen
Director, National Cemetery System

Distribution: RPC 4014
FD

USE OF FLAGS

1. FLAG ETIQUETTE AND DISPLAY

   a. Respect will be demonstrated at all times for the United States flag, the VA's Distinguishing flag and other flags authorized for public display at national cemeteries through appropriate handling and storage, display and disposition in accordance with the Federal Flag Code (Public Law 94-344), title 38 United States Code, section 2403(c), and title 38, code of Federal Regulations, section 1.9 and 1.10.

   b. Primary flags authorized for public display in national cemeteries are the United States flag, the VA's Distinguishing flag, State flags, the POW/MIA flag and, under limited circumstances, the Confederate flag.

   c. Certain other flags, pennants and guidon banners may be displayed at the discretion of the Cemetery Director for special occasions so long as they are of an honorable military, civic or service symbolism. Examples of these are the Medal of Honor flag, the Buffalo Soldiers guidon, military ship and unit flags (often displayed at wreath laying ceremonies), Senior flag and General Officer flags (usually displayed during a visit), and flags commemorating certain national historic events.

   d. Service Organization and Military Department flags may be appropriately displayed for special occasions. These flags may also be placed in the administration building, along

with the United States flag, as a static display.

e. Foreign National flags may be displayed under certain circumstances such as visitation by a Head-of-State. The graves of foreign prisoners of war may be decorated with their respective Foreign National Flag for authorized ceremonies conducted by their countrymen or government officials.

f. All flags, pennants and guidon banners will be displayed appropriately and always subordinate to the United States flag.

2. PRIMARY UNITED STATES FLAG

a. Each national cemetery will display an all-weather United States flag on the main flagpole each day of the year during the hours the cemetery is open, but not to exceed the hours of daylight. Cemeteries having an appropriately illuminated flagpole may display the flag during non-daylight hours so long as the flag is illuminated between the hours of sunset and sunrise.

b. Cemetery personnel will display the United States flag on Memorial Day at half staff until noon, at which time it will be raised to full staff. The flag may also be flown at half staff when otherwise authorized or by Presidential proclamation commemorate the death of distinguished citizens, or each December 7 in honor of the individuals who died as a result of their service at Pearl Harbor.

c. Cemetery personnel will bring the United States flag to half

staff one-half hour before the start of the first committal service and raise it to full staff one-half hour after the conclusion of the last committal service each day.

d. No other flag will be routinely displayed subordinate to (below) the United States flag on the main flagpole.

3. MEMORIAL FLAGS

a. 38 CFR 1.10 governs eligibility for and disposition of the United States flag for burial purposes. General information related to memorial flags is found in VA Pamphlet 27-75-1, United States Flag for Burial or Memorial Purposes.

b. Cemetery Directors should ensure that each casket and urn containing the remains of an eligible veteran delivered to a national cemetery for burial is accompanied by an appropriately displayed United States flag, unless the primary next of kin or, if none, the party responsible for the burial wishes otherwise.

c. Memorial flags may be obtained by next of kin on behalf of eligible veterans through application using VA Form 2008, Application for United States Flag for Burial Purposes. Memorial flags are issued by VA facilities, including national cemeteries, and most U.S. post offices. Each national cemetery should maintain an adequate supply of VA Forms 2008, for use by the public in applying for the issuance of a memorial flag.

d. Each national cemetery will maintain a supply of memorial flags which is adequate to meet its needs. Order memorial

flags (VA Stock Number 8345-00-656-1432) through established supply channels using VA Form 90-2237, Request, Turn-in and Receipt for Property or Services. Memorial flags are issued in accordance with guidance provided in VA Pamphlet 27-75-1, and their distribution is accountable.

e. Usually, remains arriving at the cemetery for burial are accompanied by a memorial flag. When remains arrive at the cemetery unaccompanied by a memorial flag, and the responsible party desires a flag, it will be issued by the national cemetery upon application. When remains of deceased active duty military personnel are consigned directly to the cemetery, but were inadvertently shipped without an accompanying memorial flag, the cemetery will provide a flag without application.

f. Cemetery personnel will inspect all memorial flags that accompany remains to assure that they are free of defects. Defective flags will be replaced with cemetery stock and turned in through established supply procedures for stock replenishment.

g. Cemetery personnel will assure that the memorial flag which drapes a casket or is displayed with an urn containing cremated remains is displayed in accordance with the flag code and appropriately presented.

4. AVENUE OF FLAGS

a. An Avenue of Flags is the flying of many United States flags usually arrayed on both sides of the principal drive

leading from the main entrance into the cemetery. In newly constructed national cemeteries and other cemeteries where appropriate, the Avenue of Flags is the primary display of respect for the service performed by our Nation's veterans, and replaces the decorating of individual graves with flags on Memorial Day.

b. United States flags used in the Avenue of Flags are memorial flags issued to honor deceased veterans which are then donated by the next of kin to the cemetery for display. Cemetery Directors must make it clear to the donor that these flags become the property of VA, and that the donation is unconditional. Loaned flags or new memorial flags drawn from stock will not be used for display in the Avenue of Flags. The extent of the Avenue of Flags at each cemetery is determined by the number of serviceable memorial flags available, and the program scope that can be readily managed by the cemetery's staff.

c. When a memorial flag donations has been accepted, the donor will be presented a prepared VA Form 40-4998, Certificate of Appreciation (Avenue of Flags Program), by the Cemetery Director. This certificate should be prepared in a manner which renders it suitable for presentation and display. When practical, the certificate should be presented in person. When this is not practical, the certificate should be mailed to the donor along with an appropriate, but brief, cover letter signed by the Cemetery Director. The certificate and letter should be packaged in a manner that offers protection from damage during shipment.

d. Where Avenues of Flags are authorized and implemented, they are displayed on Memorial Day, Veterans Day and other appropriate special occasions such as Flag Day and Independence Day when weather permits. The wishes of local service and civic organizations are considered in determining on which special occasions to display the Avenue of Flags.

e. To the extent that it can be promoted, the Avenue of Flags will be supplied, installed, maintained, erected and taken down through voluntary donation of time and labor by local service and civic organizations, school groups and other interested parties.

f. Flag staffs used to display the Avenue of Flags will be sufficient in size and strength to adequately and appropriately display a standard memorial flag. Flag staffs are secured by insertion into an in-ground receptacle, usually spaced about 20 feet apart (6m), so passing vehicles or pedestrians cannot interfere with the flag.

5. GRAVE DECORATING FLAGS

a. At many national cemeteries, each grave is decorated with a small United States flag on Memorial Day. This practice will be continued at these cemeteries except where substitution of an Avenue of Flags is strongly favored by the local veteran community, and where discontinuation would not impact negatively on the National Cemetery System (NCS). Efforts to discontinue the practice of decorating graves with individual flags may be initiated only with the prior approval of the Director, Office of Field

Operations, and with the direct involvement of Field Programs and Public and Consumer Affairs Service staffs.

b. Grave decorating flags will be displayed only on Memorial Day each year. A Grave Decorating Flag Program will not be implemented at newly constructed national cemeteries or at cemeteries where display of the Avenue of Flags is the traditional method of arraying United States flags on Memorial Day.

c. United States flags used to decorate graves are acquired at Government expense through established procurement procedures. Cemetery Directors will maintain an adequate stock of serviceable flags to decorate graves in the cemetery. It is important that these flags are protected from damage and properly stored to maximize their useful life.

d. Flags will be placed on graves in a uniform manner, usually 1 foot (.304 m) in front of and centered on the headstone or marker. When required by the number of graves to be decorated and available labor, graves may be decorated the day before Memorial Day and flags removed the day after Memorial Day. This will result in illuminated flags in place during non-daylight hours; however, this is an authorized deviation from the flag code made necessary by logistics.

e. Cemetery Directors will actively promote voluntary assistance from local service and civil organizations, Boy and Girl Scouts, other groups, and interested citizens in placing and removing grave decorating flags. Volunteers

will be supervised to the extent possible to assure that flags are treated with dignity and respect, and are properly placed. Cemetery personnel will accomplish flag related work that cannot be done with volunteer assistance.

f. After removal and before storage, flags will be inspected, dried, if necessary, and culled to remove those that are unserviceable. Unserviceable flags will be disposed of appropriately. After inventorying serviceable flags, replacements will be ordered to assure that an adequate supply of flags will be on hand when needed. Flags will be stored in a dignified manner out of public view.

6. THE FLAG OF THE CONFEDERATE STATES OF AMERICA (CSA)

a. The flag of the Confederate States of America (CSA) will be displayed in national cemeteries only to represent respect for those decedents who served in the armies of the CSA during the Civil War. As such, the display of the Confederate flag is limited to small individual grave flags arrayed on Memorial Day and, in States where it is officially observed, Confederate Memorial Day.

b. The display of the Confederate flag in national cemeteries is allowed only under the sponsorship of a local service or historic organization. The stock of Confederate flags for display in national cemeteries will be maintained through donation by the sponsoring organization. Confederate flags may not be purchased with Government funds. On occasions when they are displayed, Confederate flags will be placed and removed with volunteer labor organized,

provided and supervised by the sponsoring organization.

c. The Confederate flag is to be subordinate to the United States flag in size and prominence of display. When displayed on graves in conjunction with the United States flag on Memorial Day, Confederate flags are placed 3 feet (.914 m) in front of and centered on the headstone of deceased Confederate veterans. When displayed without he presence of the United States flag, as may be done on Confederate Memorial Day, the Confederate flag is placed 1 foot (.304 m) in front of and centered on the headstone of deceased Confederate veterans.

7. THE LEAGUE OF FAMILIES' POW/MIA FLAG

a. The official League of Families' POW/MIA flag is authorized for display in national cemeteries. The POW/MIA flag is displayed during daylight hours at all national cemeteries on memorial Day, Veterans Day, and National POW/MIA Recognition Day. The flag may be flown more frequently, or daily, at cemeteries where its display is promoted and supported by local interest groups.

b. The POW/MIA flag is not displayed subordinate to the United States flag on the cemetery's main flag pole. It is displayed on a separate flag pole erected in a location to exhibit appropriate respect for the flag.

c. When displayed only on mandatory occasions, the POW/MIA flag may be flown from a flag staff similar to those used in Avenues of Flags. At cemeteries where local interest has promoted more frequent or daily display of the

POW/MIA flag, a permanent flagpole dedicated solely to that use may be installed. Local interest groups and organizations are encouraged to provide input on their preferred location of this flagpole on cemetery grounds however, the Cemetery Director, in coordination with the NCAO Director, will make the final decision on its location.

THE FLAG OF THE CONFEDERATE STATES OF AMERICA

Federal laws regulate display of non-United States flags. The flag policy of the National Cemetery Administration (NCA) is based on title 38, Code of Federal Regulations, section 1.218(a)(14)(ii), and fosters respect for an individual veteran's service to Our Country by maintaining consistency across NCA.

The flag of the Confederate States of America (CSA) is displayed at VA national cemeteries out of respect for those decedents who served in the CSA Army or Navy during the Civil War.

The Confederate flag is always subordinate to the United States flag in size and prominence of display.

Display of the Confederate flag is limited to Memorial Day, Confederate Memorial Day, or the day a State memorializes Confederate decedents.

The display of Confederate flags at VA national cemeteries is allowed only under the sponsorship of a local service or historic organization. The flags will be maintained through donation by the sponsoring organization and may not be purchased with Government funds. Flags will be placed and removed with volunteer labor organized, provided, and supervised by the sponsoring organization.

At VA national cemeteries where Confederates are buried in individual graves, small individual Confederate gravesite

flags may be placed on each grave on authorized days.

At VA national cemeteries where Confederates are buried in mass graves, the Confederate flag will be displayed on a separate flag pole that is subordinate to the main flag pole on authorized days.

Confederate flags are placed three feet in front of and centered on the headstones of deceased Confederate veterans when displayed with the United States flag on Memorial Day.

Confederate flags are placed one foot in front of, and centered on, the headstone of deceased Confederate veterans when displayed without the presence of the United States flag, which may be done on Confederate Memorial Day.

National Cemetery Administration
May 1999

\IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Patrick J. Griffin, III,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	WMN 00-CV-2837
	)	
Department of Veterans	)	
Affairs, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF RANDOLPH G. HEPP

I, Randolph G. Hepp, hereby declare as follows:

1. I am a photographer at the Patuxent Naval Air Station, St. Mary's County, Maryland. I am an employee of the United States Navy, and my current position title is Photographer/scientific. I have been employed by the United States government as a photographer for the last eighteen years, and photography has been my principal occupation for the last thirty-three years. I am not employed by the United States Department of Veterans Affairs or any of its components, and I have never been so employed. This declaration is based on personal knowledge obtained by me.

2. On October 17, 2000, I visited the Point Lookout Confederate Cemetery at Point Lookout, Maryland, and took numerous pictures of the Cemetery and its surroundings. During my

photographic session of approximately one hour, I also took the opportunity to observe the Cemetery and its surroundings.

3. My current office is located at Patuxent Naval Air Station. The main entrance to Patuxent (Gate 2) is approximately 16.4 miles north of Point Lookout Confederate Cemetery on Maryland Route 5. The Cemetery is on the west side of Route 5.

4. In visiting the Point Lookout Confederate Cemetery and taking the pictures, I noticed that the Cemetery had two stone monuments, one larger than the other; that the area around the monuments appeared to have a rectangular shape; and that the area was surrounded on all four sides by a fence, with a gate on the east side, toward Maryland Route 5.

5. The pictures attached hereto as Exhibits 1 through 24 accurately depict the Cemetery and its surroundings as I saw them on October 17, and appear to be prints of the pictures that I took.

6. I used two separate rolls of Kodak Professional "Porta" 160VC, 35 mm, color print film to take all of these pictures. In taking Exhibit 2, I used a 35 mm camera lens; for Exhibit 22, I used a fish-eye camera lens; and for all of the other pictures, I used a 60 mm lens. No flash or other artificial lighting was used for any of these pictures.

7. Exhibits 1 and 2 were taken while standing on Maryland Route 5, looking to the south toward the Cemetery. The smaller of the two monuments in the Cemetery is visible near the center of Exhibits 1 and 2. In Exhibit 2, the base of the larger monument is visible on the right side, behind what appears to be a telephone

pole.

8. The orientation of the camera in Exhibits 3, 4, and 5 is as follows: Exhibit 3: toward the southwest; Exhibit 4: toward the west; Exhibit 5: toward the northwest. The monument in the center of Exhibit 3 is the same monument that appears in Exhibits 1 and 2. The extreme southeast corner of the base of the larger monument appears on the right side of Exhibit 3. The monument in Exhibit 4 is the Cemetery's larger monument. The same circular red sign appears in Exhibits 3, 4, and 5.

9. The same rectangular sign attached to the fence, to the right of the gate, appears in Exhibits 3, 5, and 6.

10. Exhibits 6, 7, 8, 9, and 10 depict the larger of the two monuments, or part of the larger monument. Exhibit 8 depicts the base of the larger monument, with the camera facing toward the southwest. The smaller monument at the Cemetery also appears in Exhibits 7 and 8, on the left side of each picture. The plaque that appears in Exhibit 9 is a close-up of the same vertical plaque that appears on the near (that is, east) face of the larger monument in Exhibits 6 and 7. In Exhibit 10, the camera is, again, facing toward the southwest.

11. The north half of the base and of the lower portion of the larger monument appear on the left side of the Exhibit 11. The small white building toward the right side of Exhibit 11 is the same small white building that appears on the right side of Exhibit 6.

12. Exhibit 12 depicts the fence along the north side of the Cemetery, with the camera facing toward the west. The small white

building in the background of Exhibit 12 is the same small white building that appears in Exhibit 11.

13. In Exhibit 13, the camera is facing toward the southeast, and in Exhibit 14, the camera is facing toward the east-southeast. Maryland Route 5 is visible on the other side of the fence in both Exhibit 13 and Exhibit 14. The smaller monument at the Cemetery appears toward the right side of Exhibit 13 – the same smaller monument that appears in Exhibits 1, 2, 3, 7, and 8.

14. In Exhibits 15 and 16, the camera is facing toward the northeast. The structure in the left foreground of Exhibit 15 is part of the same small white building that appears near the left side of Exhibit 6. The white building with a chimney that appears near the center of Exhibit 15 and on the left side of Exhibit 16 is the same building, and appears to be a private residence.

15. Exhibit 17 depicts the back (that is, the west side) of the fenced area around the monuments, with the camera facing toward the south. The structure in the foreground of Exhibit 17 is part of the same small white building that appears on the rigth side of Exhibit 6, and the structure of the background of Exhibit 17 is the same small white building that appears near the left side of Exhibit 6.

16. In Exhibit 18, the camera is facing toward the west-southwest. The small white building in the background is the same small white building that appears in the background of Exhibit 17, and the light fixture in the foreground of Exhibit 18 is the same light fixture that appears at the center of Exhibit 13, to the right of the flag pole.

17. In Exhibit 19, the camera is facing toward the north. The gate in the east fence is visible near the right side of the picture. The white structure with a chimney in Exhibit 19 is the same structure that appears in Exhibits 15 and 16.

18. Exhibit 20 depicts the fence along the south side of the Cemetery, with the camera facing toward the west. The smaller of the two monuments is visible to the right of center, partially obscured by a tree trunk. The small white building in the background of Exhibit 20 is the same small white building that appears in Exhibit 18.

19. In Exhibit 21, the camera is facing toward the north, with the gate near the center of the picture and Maryland Route 5 visible on the other side of the fence.

20. Exhibit 22 is a fish-eye view of the entire Cemetery, with the camera facing toward the west.

21. In Exhibit 23, the camera is facing toward the northwest. The larger monument is in the center of the picture, the smaller monument is at the left side, and part of Maryland Route 5 is in the lower-right foreground.

22. In Exhibit 24, the camera is facing toward the north. Part of the larger monument is barely visible through the foliage on the left of the picture, and Maryland Route 5 is on the right side.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Nov.1, 2000.

/s/
RANDOLPH G. HEPP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Patrick J. Griffin, III, an individual	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil Action No.
	)	WMN00CV2837
Department of Veterans Affairs, a Department of the United States Government; Robert W. Walker, Acting Undersecretary for Memorial Affairs, National Cemetery Administration, a Division of the Department of Veterans Affairs; an individual in his official capacity; Roger R. Rapp, Director, National Cemetery System, a Division of the Department of Veterans Affairs, an individual in his official capacity; Robin Pohlman, Director, Point Lookout Confederate Cemetery, an individual in her official capacity,	)	
	)	
Defendants	)	

DECLARATION OF JAMES B. COUCH

I, JAMES B. COUCH, declare and say as follows:

1. I am an individual resident of the State of Maryland and am over the age of 18. I know the matters set forth herein of my own personal knowledge and if called as a witness could and would testify competently thereto.

2. In or about early 1995, I visited Point Lookout Confederate Cemetery ("the Cemetery") located near Scotland, Maryland, and took a photograph of the main flag pole. Attached hereto as Exhibit 1 is a true and correct copy of the photograph. The photo accurately shows the appearance of the flag pole as it appeared at the time of my visit.

3. Each year, in or about early June, a Confederate memorial service is held at the Cemetery. I have attended this ceremony almost every year since 1984. On or about June 10, 1995, I attended such a ceremony and took a photograph of the flag pole at the Cemetery. Attached hereto as Exhibit 2 is a true and correct copy of that photograph. The photo accurately shows the appearance of the flag pole as it appeared on or about June 10, 1995. At all the annual Confederate memorial services I have attended, Confederate flags were displayed. At two or three of these memorial services Confederate flags (approximately three feet by five feet in size) were flown on poles placed by the fence running along the front of the Cemetery. Typically, a Confederate color guard is present at the memorial ceremony. The color guard carries a group of flags (which are approximately three by five feet or four feet square) to the Cemetery's Federal Monument. Exhibit 2 shows the color guard that was present at the June, 1995 ceremony. The color guard as shows in Exhibit 2 is typical of the color guard that is present at the memorial ceremony each year. The flags shown in Exhibit 2 are typical of the flags the Confederate color guard carries each year.

4. On or about June 8, 1996, I took a photograph of the flag pole at the Cemetery in connection with the 1996 memorial ceremony. Attached hereto as Exhibit 3 is a true and correct copy of that photograph. The photo accurately shows the appearance of the flag pole as it appeared on or about June 8, 1996.

5. I am a member of Captain Vincent Camalier Camp No. 1359, Sons of Confederate Veterans ("Camalier Camp"). The Camalier Camp, which has about twenty-nine (29) member, is based in St. Mary's County, Maryland, the county in which the Cemetery is located. I am the past camp commander of Camalier Camp and am active in it. The Camalier camp strongly supports the daily display of a full-sized Confederate flag at the Cemetery, flown from its own separate flag pole.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the United States of America.

Executed this 15th day of September, 2000, at Lusby, Maryland.

/s/
James B. Couch

Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

No. 01-1687

(2)

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Congress has declared that national cemeteries maintained by the Department of Veterans Affairs (VA) "shall be considered national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). To implement that mandate, the VA has promulgated regulations providing for the display of the American flag at national cemeteries, but strictly limiting the display of other flags at such sites. The question presented is:

Whether the court of appeals properly upheld the VA's denial of petitioner's request to fly a Confederate flag on a daily, year-round basis at a national cemetery in Maryland.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1687

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TO THE UNITED STATES COURT OF APPEALS
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 274 F.3d 818. The opinion of the district court (Pet. App. C1-C23) is reported at 129 F. Supp. 2d 832.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2001. A petition for rehearing was denied on February 12, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has placed the country's national cemeteries under the authority of the National Cemetery Administration (NCA) within the Department of Veterans Affairs (VA). 38 U.S.C. 2400(b), 2403(c). NCA oversees 120 national cemeteries comprising more than 13,000 acres. By statute, the cemeteries are to be maintained as "national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). Consistent with that mandate, Congress has authorized the Secretary of Veterans Affairs to "permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day." 38 U.S.C. 2403(c); see 4 U.S.C. 6 ("Time and occasions for display" of U.S. flag).

Congress also has provided for the display of the National League of Families POW/MIA flag (POW/MIA flag) at national cemeteries and certain other locations on six days each year -- Armed Forces Day, Memorial Day, Flag Day, Independence Day, National POW/MIA Recognition Day, and Veterans Day. 36 U.S.C. 902(b), (c) and (d)(4). In doing so, Congress has explained that the POW/MIA flag is "the symbol of the Nation's concern and commitment to achieving the fullest possible accounting of Americans who, having been prisoners of war or missing in action, still remain unaccounted for." 36 U.S.C. 902(b)(1) and (2).

The Secretary of Veterans Affairs is "authorized to make all rules and regulations which are necessary or appropriate" to administer cemeteries and memorials under the VA's jurisdiction. 38 U.S.C. 2404(a). The Secretary has delegated this authority to

the Under Secretary for Memorial Affairs, who heads NCA (formerly the Director of the National Cemetery System (NCS)). 38 C.F.R. 2.6(f); see 38 U.S.C. 512, 2400(a) (authority for delegation).

The VA regulates activities on "property under the charge and control of VA," including national cemeteries as well as VA hospitals, clinics, and regional offices. 38 C.F.R. 1.218(a). Section 1.218(a)(14) of the VA's regulations provides in part:

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. * * *
>
> (ii) For the purpose of the prohibition expressed in this paragraph, unauthorized demonstrations or services shall be defined as, but not limited to * * * the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee * * * .

38 C.F.R. 1.218(a)(14).

In 1995, the VA issued a Directive and Handbook (Pet. App. E1-E12) providing interpretive guidance on Section 1.218(a)(14) with respect to the display of flags in national cemeteries. Among other things, that guidance -- which has been referred to in this case as the Flag Manual or Old Flag Manual -- generally authorized the display of the Confederate flag in national cemeteries on only two days a year, Memorial Day and, in States where it is observed, Confederate Memorial Day. See id. at E10-E11, E13.[1]

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[1] On April 30, 2001, after the district court issued its decision in this case, the VA issued a new directive on flags in national cemeteries. Pet. App. D1-D14. That guidance does not materially alter the restrictions at issue in this case, see id. at D9-D12, and thus has not resulted in any change in the VA's position with respect to petitioner's effort to display the

2. Point Lookout Confederate Cemetery (Point Lookout) is a national cemetery located in St. Mary's County, Maryland. During the Civil War, the federal government maintained a prisoner of war camp at Point Lookout. Many Confederate soldiers died in captivity at Point Lookout and approximately 3300 are buried in a mass grave there, marked by an 85-foot monument erected and maintained by the federal government. The names of Confederate prisoners known to have died at Point Lookout are listed on 12 plaques at the base of the monument; a separate plaque notes that the monument was built by the federal government. A smaller state monument also has been erected at Point Lookout. Pet. App. C1-C2.

The only other permanent display at Point Lookout is the flagpole on which the U.S. flag is flown. Pet. App. C2. The American flag is flown every day at all hours of the day, and is illuminated from sunset to sunrise. Ibid. As required by statute (36 U.S.C. 902), the POW/MIA flag is flown at Point Lookout on six days a year -- Armed Forces Day, Memorial Day, Flag Day, Independence Day, National POW/MIA Recognition Day, and Veterans Day. Pet. App. B11 n.3; see 36 U.S.C. 902. A Confederate flag was displayed daily at Point Lookout between 1994 and May 1998 -- contrary to the regulations discussed above -- due to the ultra vires action of a VA employee. Pet. App. C15 n.12.

3. Petitioner is a member of the organization Sons of Confederate Veterans, and is a descendant of a Confederate soldier imprisoned at Point Lookout. Pet. App. C4, C5 & n.4. He requested

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Confederate flag at Point Lookout. See id. at B4 n.1.

permission from the VA to erect a flagpole and display the Confederate flag on a daily basis at Point Lookout. When the VA denied that request, petitioner filed this action alleging, inter alia, that the VA's regulations restricting the display of the Confederate flag in national cemeteries are unconstitutional both as applied to him and on their face. Id. at C4-C5.

The district court granted petitioner's request for declaratory and injunctive relief. Pet. App. C1-C23. The court first held that it lacked jurisdiction to entertain petitioner's facial challenge to the VA's regulations concerning the display of flags in national cemeteries, including the VA's guidance in the 1995 Directive and Handbook on flag displays, explaining that under 38 U.S.C. 502 such a facial challenge is within the exclusive jurisdiction of the Court of Appeals for the Federal Circuit. Pet. App. C6-C8.[2] Accordingly, the court focused its decision to petitioner's as-applied challenge. Id. at C9.

In analyzing that challenge, the court described "the speech at issue" as "the display of the Confederate flag" at Point Lookout. Pet. App. C11. The court then found that Point Lookout is a "nonpublic forum," explaining "that Point Lookout, and national cemeteries in general, are not 'generally available'" to

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[2] Petitioner filed a separate action in the Federal Circuit challenging the VA's regulation on its face. See Pet. 7 n.3. In Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (2002), petition for cert. pending, No. 01-1782 (filed May 30, 2002), the Federal Circuit rejected that challenge. Petitioner has filed a separate petition for a writ of certiorari from the Federal Circuit's decision, and the government has filed a separate opposition to that petition.

the public, and that "the nature of the property [i.e., a cemetery] is not compatible with expressive activity." Id. at C13-C14. "Having determined that Point Lookout is a non-public forum," the court stated that "restrictions on the requested display of the Confederate flag will be upheld only if they are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id. at C14; see id. at C12-C13 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985)).

Applying that test, the court rejected the government's argument that the restrictions are reasonable in light of Congress's declaration that national cemeteries "shall be considered national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). In the court's view, there was no reason to conclude that display of the Confederate flag would "create controversy or disrupt the tranquility and dignity of Point Lookout," and "one is hard put to imagine a rationally thinking person attributing a racial or discriminatory message to [the Confederate flag]." Pet. App. C15.

The court also rejected the VA's argument that the display of a flag at a national cemetery established by Congress is a form of government speech. Instead, the court stated, "[t]he issue in the present case involves private speech on government property, which implicates the protections provided by the First Amendment." Pet. App. C16-C17. In addition, the court concluded that the VA's refusal to allow petitioner to display the Confederate flag at

Point Lookout on a daily basis amounted to impermissible viewpoint discrimination and was content-based. Id. at C19-C21.

Accordingly, the court held that the VA's regulations, "as applied to the Confederate flag in the context of Point Lookout," violate the First Amendment. Pet. App. C21. The court ordered the VA to allow petitioner to display the Confederate flag at Point Lookout on a daily basis, from a flagpole erected and maintained by petitioner. Id. at C22, C10-C11 n.9.

4. The court of appeals reversed. Pet. App. B1-B13. The Fourth Circuit agreed with the district court and the parties "that Point Lookout is a nonpublic forum," and that "[r]estrictions on speech in such a forum must be both reasonable in light of the purpose of the forum and viewpoint neutral." Id. at B3 (citing Cornelius, 473 U.S. at 806). Applying that framework, the court concluded that the VA's denial of petitioner's request to display the Confederate flag at Point Lookout was both reasonable and viewpoint neutral, and therefore was permissible. Id. at B2.

The court of appeals stated that the purpose of Point Lookout "is to honor, as Americans, in tranquil and nonpartisan surroundings, those who have given their lives to the Nation," and held that the VA's restrictions on the display of flags at Point Lookout "are reasonable both as a means of ensuring the integrity of the VA's own message (which, in this case, coincides with the purpose) and, relatedly, as an effort to maintain the nature of the forum." Pet. App. B4. In so holding, the court emphasized that "Congress' evident concern that [national] cemeteries 'shall be

considered national shrines' and its focus on 'our gallant dead,' combined with its emphasis on the flying of the 'flag of the United States of America,' all but inexorably lead to the conclusion that Congress did, as the VA maintains, intend national cemeteries to be places in which we honor 'our gallant dead' as Americans." Id. at B5 (quoting 38 U.S.C. 2403(c)).

The court of appeals noted that "nothing in the district court's opinion rejects or even refutes the VA's position that the purpose of Point Lookout is to honor those Confederate soldiers who are buried there as Americans." Pet. App. B6. In any event, the court continued, "the reasonableness of the VA's restrictions turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans." Ibid. Contrary to petitioner's argument, the court stated, the district court made "no factual finding" on that "pivotal distinction to which [the court was required to] defer." Ibid. Thus, the court of appeals reasoned, "because the statute compels us to accept the VA's position [on that distinction], we hold that the purpose of Point Lookout is to honor the soldiers buried there as Americans." Ibid.

The court of appeals had "no trouble" concluding that the VA's restrictions on displaying the Confederate flag are reasonable in light of the purpose of Point Lookout. Pet. App. B7. The court explained that "[t]he government is entitled to promote particular messages and to 'take legitimate and appropriate steps to ensure that its messages [are] neither garbled nor distorted.'" Ibid. (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S.

819, 833 (1995)). Nor, in the court's view, was there anything unreasonable about the VA's decision to allow the display of the Confederate flag in national cemeteries only on Memorial Day and Confederate Memorial Day. Id. at B8. Instead, the court concluded that the VA's policy reasonably accommodated the interests of those such as petitioner who wished to display the Confederate flag "without unduly disturbing or distorting the VA's overall message of honoring the dead as American citizens." Ibid.

Likewise, the court of appeals concluded that the challenged restrictions "were reasonable in light of the VA's desire to preserve the tranquility of national cemeteries." Pet. App. B9. "[C]ertainly," the court explained, "the VA could reasonably believe that the Confederate flag could cause controversy and that such controversy could undermine the VA's goal of keeping the cemeteries free from partisan conflict." Ibid. Moreover, the court continued, "[t]he First Amendment does not preclude the VA from taking steps to preserve the nature of this nonpublic forum," ibid. (citations omitted), "a cemetery dedicated to honoring, as Americans, the Nation's war dead." Id. at B10.

The court of appeals also held that "[t]he district court erred by concluding that the VA discriminates against [petitioner]'s message on the basis of viewpoint." Pet. App. B12. The court explained that, because the VA is allowed to determine its "own message," "[t]he only issue is how the VA treats what little private speech it does allow at [Point Lookout]." Id. at B10-B11. In that regard, the court found that under the VA's

regulations "groups that wish to fly the Confederate flag actually enjoy an advantage over other groups," id. at B11, i.e., they "may fly the Confederate flag two days a year without seeking special permission." Ibid. Accordingly, the court held, "[o]n this record, it is not possible to conclude that the VA discriminates against those who seek to display the Confederate flag or even that the VA is motivated by animosity toward that flag." Id. at B12.[3]

ARGUMENT

The court of appeals correctly held that petitioner is not entitled to erect a flagpole and fly the Confederate flag on a daily basis at the Point Lookout national cemetery. Its unanimous decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner suggests that "the Court should grant review to clarify the distinctions between speech and the forum for speech and between private speech and government speech." Pet. 13 (heading). In particular, petitioner argues that the court of appeals "simply conclude[d] that the VA is using the Cemetery itself to communicate its purported message of honoring the Confederate dead 'as Americans,'" and "thus transform[ed] the

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[3] The court of appeals rejected petitioner's facial challenge to the VA's regulations. Pet. App. B12-B13. The court explained that, under 38 U.S.C. 502, it appeared that only the Court of Appeals for the Federal Circuit had jurisdiction to consider such a challenge. Pet. App. B12. In any event, the court observed that petitioner's facial claim, too, lacked merit, because "the precise form of expression in which [petitioner] wishes to engage -- daily display of a Confederate flag in a nonpublic forum not open to such -- is, by definition, not constitutionally protected expression." Id. at B13.

Cemetery from a government-owned forum for private speech -- where viewpoint discrimination is unconstitutional -- into government speech -- which may express the government's favored viewpoint." Id. at 14 (citations omitted). That is incorrect.

In conducting its First Amendment analysis, the court of appeals faithfully followed the principles applied by this Court in Cornelius. See 473 U.S. at 797; see Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-678 (1998) (discussing Cornelius). The court identified the relevant forum, then, after determining that the forum is nonpublic, looked to whether the challenged restriction on speech in that forum is "reasonable in light of the purpose served by the forum and [is] viewpoint neutral." 473 U.S. at 806. It is undisputed that Point Lookout is a nonpublic forum. Pet. App. B3. In determining the purpose of that forum, the court of appeals properly looked to the intent of Congress in establishing the forum. See id. at B4-B6.

In light of the statutory mandate in 38 U.S.C. 2403(c), the court of appeals correctly determined that "the purpose of Point Lookout is to honor the soldiers buried there as Americans." Pet. App. B6. And in light of that purpose, the court correctly determined that the VA's restrictions on the display of the Confederate flag at Point Lookout are reasonable. Indeed, the court had "no trouble" reaching that conclusion. Id. at B7. As this Court emphasized in Cornelius, "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."

473 U.S. at 808. The restrictions at issue in this case readily meet that "deferential test." Pet. App. B7.

The court of appeals also correctly observed that the government is entitled "to promote particular messages," and to ensure that its intended message is "neither garbled nor distorted." Pet. App. B7 (citing Rosenberger, 515 U.S. at 833); see Rust v. Sullivan, 500 U.S. 173 (1991). Indeed, the very nature of a nonpublic forum lends itself to the conclusion that the government has significant control over the speech, whether government or private, that takes place in that forum. See Cornelius, 473 U.S. at 805-806; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (a nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication"). There is nothing unusual, therefore, about the Fourth Circuit's decision that the VA may take reasonable steps to regulate speech or expressive conduct at Point Lookout, consistent with the clear purpose of that forum "to honor the soldiers buried there as Americans." Pet. App. B6.

2. Petitioner argues that "the Court should grant review to clarify that government may not restrict access to a nonpublic forum on the basis of viewpoint." Pet. 21 (heading). But that issue is not presented in this case. The court of appeals specifically determined that the restrictions at issue are "viewpoint neutral." Pet. App. B12; see id. at B10-B12. That determination is correct and does not warrant further review.

Petitioner asserts that "[t]he decision below allows the VA to exclude the Confederate flag from the Cemetery 363 days a year because of the viewpoint(s) it expresses," in violation of the First Amendment. Pet. 22. The court of appeals, however, specifically found that, "[o]n this record, it is not possible to conclude that the VA discriminates against those who seek to display the Confederate flag or even that the VA is motivated by animosity toward that flag." Pet. App. B12. Indeed, as the court observed, under the VA's regulations "groups that wish to fly the Confederate flag actually enjoy an advantage over other groups," inasmuch as they "may fly the Confederate flag two days a year without seeking special permission." Id. at B11.

Moreover, as noted, the VA's practice of restricting the display of banners such as the Confederate flag is consistent with Congress's neutral objective of honoring all those buried at national cemeteries "as Americans." Pet. App. B6. The fact that the VA permits the display of the Confederate flag on Memorial Day and Confederate Memorial Day hardly suggests that the VA has discriminated against the Confederate flag. Rather, as the court of appeals noted, it merely reflects the VA's decision "to accommodate those, like [petitioner], who wish to honor the soldiers as Confederates," on holidays that naturally lend themselves to such an observance. Id. at B8. In addition, in deciding what displays are appropriate, the VA may consider that allowing the display of flags other than the U.S. flag may

undermine Congress's objective of creating a setting "dedicated to honoring, as Americans, the Nation's war dead." Id. at B9-B10.[4]

Nor, as petitioner suggests (at 25), did the court of appeals adopt or apply "an abuse-of-discretion standard of First Amendment review." The court of appeals merely recognized that the VA's reasonable, viewpoint-neutral restrictions on private speech in a non-public forum like Point Lookout must be upheld. As discussed above, and explained by the court of appeals, that analysis comes straight from Cornelius. Pet. App. B3. It in no way conflicts with any decision of this Court or any court of appeals.

Petitioner contends (at 25) the Fourth Circuit "ignored * * * key findings of fact that it should have reviewed for clear error." That is incorrect. The court of appeals specifically discussed the purported findings relied upon by petitioner, and explained that, even if assumed to be valid findings, they were beside the point for purposes of the forum analysis. Pet. App. B6. As the court explained, "the reasonableness of the VA's restrictions turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans." Ibid. The district court made "no factual finding" on that point and, in any event, the court of appeals properly concluded that the statute compels the conclusion that "that the purpose of Point Lookout is to honor the soldiers

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[4] Petitioner's reliance (at 23) upon case law rejecting the principle of a "heckler's veto" is misplaced. The notion of a heckler's veto does not come into play here, because, as the court of appeals properly concluded, the VA has restricted private flag displays at Point Lookout and other national cemeteries without respect to viewpoint. Pet. App. B12.

buried there as Americans." Ibid. None of the purported "special attributes and circumstances" of Point Lookout relied upon by petitioner (at 25) alters the unmistakable congressional purpose of the forum involved in this case, or renders the challenged restriction unreasonable in light of that purpose.

3. Petitioner argues that "the Court should grant review to clarify that speech restrictions in a nonpublic forum must comply with constitutional prohibitions against vagueness." Pet. 26. In particular, he asserts that "the Shuttlesworth [v. City of Birmingham, 394 U.S. 147, 150-151 (1969)] requirement of definite standards should apply in a nonpublic forum." Pet. 28. The court of appeals, however, did not pass on that question and, indeed, the court's opinion does not even mention Shuttlesworth. It is well-settled that this Court generally does not resolve questions that were not decided below, see, e.g., United States v. United Foods, Inc., 533 U.S. 405, 416-417 (2001); NCAA v. Smith, 525 U.S. 459, 470 (1999), and there is no reason for the Court to depart from that settled practice here.

Moreover, as petitioner acknowledges (Pet. 28), this issue was addressed in the separate facial challenge that he brought to the relevant VA regulations in the Federal Circuit. Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (2002), petition for cert. pending, No. 01-1782 (filed May 30, 2002). Petitioner claims that the Federal Circuit's ruling on that question in the separate action conflicts with the holding of other circuits. As explained in the government's brief in opposition to the petition in No. 01-

1782, that argument lacks merit. In any event, the argument does not support further review in this case, where that question was not even addressed by the court of appeals in rejecting petitioner's as-applied challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2002

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NO. 01-1687

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Reply Brief in Support of Petition for Writ

The petition in this case presents fundamental issues of First Amendment law. What is a viewpoint-based speech restriction? How does such a restriction differ from a legitimate subject matter exclusion? When is the criterion for identifying excludable speech in a nonpublic forum so vague and subjective that it violates the First Amendment? Do the *Shuttlesworth* vagueness standards applicable in a public forum apply in a nonpublic forum?

The petition raises equally fundamental questions about government speech. Does a nonpublic forum send a governmental message? If so, what is the message? Can the government speech doctrine apply in the absence of a traditional communicative act by the government, such as a radio broadcast or the display of a sign?

The Solicitor General opposes the petition on grounds that amount to little more than repeating the flawed reasoning of the court of appeals. Nowhere does the Solicitor make any argument that suggests that the issues described above are not presented here. The Court therefore should grant certiorari and resolve the major First Amendment issues this case raises.

I. The Petition Presents the Opportunity for the Court to Clarify the Distinction Between Legitimiate Subject-Matter Exclusion and Illegitimate Viewpoint-Based Exclusion in a Public Forum.

The Court has recognized that government may legitimately exclude subject matter from a nonpublic forum in order to preserve the forum for its intended use, but may not "'suppress expression merely because public officials oppose the speaker's view.'" *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring). The Court has also recognized that the distinction between legitimate subject-

matter exclusions and unconstitutional viewpoint discrimination "is not a precise one." *Rosenberger v. University of Virginia*, 515 U.S. 819, at 831 (1995).

The Fourth Circuit's holding on the issue of reasonableness "turns on" the "pivotal distinction" between speech that honors the Confederate dead "as Confederates" and speech that honors them "as Americans." *Griffin v. Dept. of Veterans Affairs*, 274 F. 3d 818, 822 (4th Cir. 2001). (Pet. App. B6.) The court reasons that 38 U.S.C. § 2403(c) limits speech at the Cemetery to that which honors the war dead, including Confederates, "as Americans." Id. 821 (Pet. App. B5). Speech that honors the Confederate dead "as Americans," however, appears to address the same "subject matter" as speech honoring those dead "as Confederates." The only difference between the two categories appears to be the "particular views taken by speakers on [the] subject." *Id.* at 829. If the difference is one of viewpoint, the Fourth Circuit holds that the VA's restrictions are reasonable *precisely because they exclude a disfavored viewpoint.*

A fundamental principle of First Amendment law, however, is that viewpoint discrimination in a nonpublic forum is unconstitutional. *Rosenberger,* 515 U.S. at 829-830. The petition therefore squarely presents fundamental constitutional issues: Is the "as Americans" vs. "as Confederates" distinction viewpoint-based? To resolve this issue, one must ask what is a viewpoint and what is a subject matter. If the difference is one of viewpoint, does the First Amendment allow government to establish a nonpublic forum exclusively for the expression of favored viewpoints?

The Solicitor fails to show that these issues are not presented. Instead, the Solicitor changes the subject, arguing (Opp. at 12-13), as the Fourth Circuit, held, 274 F.3d at 824 (Pet. App. B11), that the VA regulations actually confer an "advantage" on display of the

Confederate flag. But even if that were true, the "advantage" argument would not establish that the VA's regulations are viewpoint-neutral. It would only mean that the balance tips in favor of the Confederate flag over others. If the basis for the preference is viewpoint, it is still unconstitutional.

Moreover, the undisputed fact is that the VA denied Mr. Griffin's request to display the Confederate flag pursuant to its 363-day ban on such displays. Mr. Griffin suffered damage (*i.e.*, he was unable to speak) and therefore has challenged this application of the ban to him. Whether the VA's speech regulations *as a whole* favor speech that honors the Confederate dead "as Confederates" is irrelevant to Mr. Griffin's *as-applied challenge to the 363-day ban*. If the ban is based on viewpoint, Mr. Griffin is entitled to prevail on his *as-applied challenge* regardless of whether the VA's regulations as a whole exhibit a preference for display of the Confederate flag over others.

The notion that the VA exhibits a "preference" for display of the only flag it bans 363 days a year is nonsensical. As shown in Mr. Griffin's petition (at 4-6), the VA subjects display of the Confederate flag to (1) an outright ban 363 days a year (Pet. App. D9, ¶ 7a); (2) an organizational sponsor requirement (Pet.App. D10, ¶ 7c.); and (3) a deviation procedure to the extent an individual seeks to display the Confederate flag at any time, or an approved organizational sponsors seeks to display the flag more than two days a year (Pet. App. D4, ¶ 2b.). *No other flags are subjected to these restrictions*. Indeed, if the "advantage" argument were correct, a party could bring an action to impose the "advantage" of a 363-day ban on non-Confederate flags.

The Solicitor argues (Opp. at 12-13) that the VA's restrictions on the Confederate flag are "consistent with Congress' neutral objective of honoring all those buried at national cemeteries *'as Americans.'*" But the intent of Congress does not trump the First

Amendment. If the "as Americans" vs. "as Confederates" distinction is viewpoint-based, Congress' "objective" in establishing the distinction and the statute it uses to achieve that objective, 38 U.S.C. § 2403(c), are not "neutral." They are unconstitutional viewpoint discrimination. Invoking the intent of Congress or a statute thus does not moot the issue of viewpoint discrimination.

The Solicitor's remaining arguments (Opp. at 13-14) relate to deference to administrative and district-court fact-finding. Whether or not deference to administrative determinations is appropriate in First Amendment cases, and regardless of whether the Fourth Circuit properly deferred to the district court's findings, the VA's regulations are still unconstitutional if they are viewpoint-based. The viewpoint issue thus is still presented, even if the Solicitor's arguments are correct.

II. THE PETITION RAISES THE ISSUE OF WHETHER THE FOURTH CIRCUIT'S "PIVOTAL DISTINCTION" IS UNCONSTITUTIONALLY VAGUE.

The Fourth Circuit holds that a VA official may draw a line between speech that honors the Confederate dead "as Americans" and speech that honors them "as Confederates" and restrict the latter, including display of the Confederate flag. The court's holding in regard to reasonableness turns on this "pivotal distinction." This Court has held that a law that confers such broad and vaguely defined powers on government officials to categorize and punish speech violates the First Amendment in a nonpublic forum. *Board of Airport Comm. v. Jews for Jesus*, 482 U.S. 569, 576 (1987).

The Solicitor (Opp. at 14) argues that the Court should not address the vagueness of the Fourth Circuit's "pivotal distinction" because the court "did not pass on that question...." This argument

makes no sense. By the Solicitor's logic, if the court of appeals announces an unconstitutional rule of law and in so doing ignores that the rule is unconstitutional, this Court must sit by helplessly because the court of appeals did not "pass" on the constitutional question.

The cases the Solicitor cites do not support his position. In both *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) and *NCAA v. Smith*, 525 U.S. 459, 470 (1999), a party sought to raise for the first time in the Supreme Court arguments the party could have raised in the court of appeals but did not. Here, by contrast, the Fourth Circuit first announced its "pivotal distinction" in the very decision Mr. Griffin challenges.

The Solicitor argues (Opp.at 14-15) that the vagueness issue was addressed in Mr. Griffin's Federal Circuit case, *Griffin v. Secretary of Veterans Affairs*, 288 F. 3d 1309 (Fed. Cir. 2002), petition for cert. pending, Case No. 01-1782 (filed May 30, 2002) and therefore should not be addressed here. This argument too makes little practical sense. Mr. Griffin was forced (Pet. App. C6-8) to bring his facial challenge to 38 C.F.R § 1.218(a)(14) in the Federal Circuit, which has exclusive jurisdiction over such a challenge. *See* 38 U.S.C. § 502. Whether *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) applies in a nonpublic forum is an issue in both cases. This question is of sufficient importance that the Court should grant review in both cases, consolidate them and decide whether § 1.218(a)(14) and the Fourth Circuit's "pivotal distinction" pass *Shuttlesworth* muster in a nonpublic forum.

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY FUNDAMENTAL CONCEPTS IN ITS FIRST AMENDMENT FORUM ANALYSIS.

The Fourth Circuit's conclusion that the Confederate flag "garbles and distorts" the VA's "chosen message" is central to the court's holdings with respect to viewpoint neutrality and reasonableness. *Griffin* at 822, 824 (Pet. App. B8, 10.) Government may favor some viewpoints over others where government is itself the speaker. *See, e.g., Rosenberger*, 515 U.S. at 833. Government speech thus is critical to the entire decision below.

The government speech argument, however, finds no support in the record. Nothing in the record shows that the VA engaged in any recognized communicative act, such as a public radio broadcast, *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*, 203 F. 3d 1085 (8th Cir.), *cert. denied*, 510 U.S. 992 (2000) or the posting of a sign, *Wells v. City ad County of Denver*, 257 F. 3d 1132 (10th Cir.), *cert. den.*, 122 S.Ct. 469 (2001) to communicate its purported "message." Nor does the record suggest that Mr. Griffin's flag display would interfere with any recognized form of speech by the VA. For example, no evidence was presented to the effect that Mr. Griffin's proposed Confederate flag display blocked the view of a VA plaque, sign or monument. What the VA says, how it says it and whether the Confederate flag "garbles and distorts" the VA's speech are questions of *fact*. But again, no facts in the record showed either speech by the VA or that Mr. Griffin's proposed flag display interfered with that speech.

In the absence of any support in the record, the Fourth Circuit simply stated that daily display of the Confederate flag "certainly 'garbles and distorts'" the VA's "chosen message." 274 F.3d at

822 (Pet. App. B8). At a minimum, this statement represents appellate fact-finding, a practice this Court has condemned. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-575 (1985). If the district court's findings are inadequate, as the Fourth Circuit found, 274 F. 3d at 821-822 (Pet. App.B6), the court should have remanded the case to the district court with directions to make appropriate findings. *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 577 (4th Cir. 1985). But the Fourth Circuit did not remand. Instead it "found" facts that are nowhere in record.

The Fourth Circuit's opinion notes that the VA's purported "message" "coincides with the purpose" of the Cemetery. *Griffin* at 821 (Pet. App. B4). The court thus seems to "find" that *the Cemetery itself* is a communicative act by the VA that sends the VA's "chosen message." If the communicative act is not the Cemetery, the opinion below simply conjures an act of speech by the VA out of thin air.

Either way, and contrary to the Solicitor's argument (Opp. at 10-11), the Fourth Circuit's reasoning does not "faithfully follow" this Court's precedents or the decisions of other circuits. It is instead a radical – and dangerous – departure from precedent. It is radical because no court has held a forum, *i.e.*, a place where speech occurs, to be government speech. On the contrary, in *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 682 (1998), the Court treated a public television broadcast of a political debate as a forum for speech, not speech by the government. In *Rosenberger*, 515 U.S. at 834-35, the Court held that university funding of student speech created a "metaphysical" forum for private speech. The Court reached similar results *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000) and *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 543-44 (2001). The Fourth Circuit's treatment of the Cemetery as speech by VA (or alternatively its

finding government speech without any communicative act at all) is a major departure from this Court's precedents and cases in which other circuits uniformly have required a recognized communicative act by the government to invoke the government speech doctrine. *See PMG International Divison, L.L.C. v Rumsfeld*, __ F.3d __, 2002 WL 31041516 (9th Cir., Sept. 13, 2002.)(discussing cases and holding government's placement of magazines in stores at military bases did not constitute government speech).

The Fourth Circuit's holding is dangerous because under the court's reasoning every forum can be viewed as communicating a message, which disfavored private expression "garbles and distorts." Under the Fourth Circuit's approach, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) *Rosenberger* would have gone the other way because the Ohio capitol mall and the University of Virginia's forum for student speech can be viewed as sending a "message" of non-involvement with religion, which a cross display or a Christian publication "garbles and distorts." (*See* Pet. at 17-18.)

The Court's forum analysis works only if a sharp distinction is maintained between the forum and speech within the forum. If that distinction is blurred, the forum where private speech enjoys viewpoint protection becomes speech government may "protect" by silencing inconsistent viewpoints. If the distinction were blurred, as it is in the Fourth Circuit's opinion, the government speech doctrine would swallow up First amendment protections for private speech in all fora. To preserve the integrity of its forum analysis, the Court should only recognize government speech where the record shows (1) a "distinct and clear message"; (2) transmitted by a recognizable act of speech; (3) "an intent to speak"; and (4) reasonable success in actually reaching an audience with the message." *See* R.P. Bezanson and W.G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1436 (2001).

In his opposition (at 11), the Solicitor does not deny that the Cemetery is the purported "act of speech" on which the Fourth Circuit relies in finding government speech. Nor does the Solicitor identify any recognized act of speech by the VA with which Mr. Griffin's flag display interferes. These omissions are telling. In sum, Mr. Griffin's petition presents fundamental issues concerning the government speech doctrine. What is "speech" by the government? Can an arrangement of monuments, a flag, a sign or other things on government property send a message? If so, how does one know what the message is, prior to being arrested for "garbling and distorting" it? In deciding these and other issues of equal importance, the Court will be able to clarify its forum analysis and the government speech doctrine, both of which are of enormous importance to our most basic freedom, the right to speak.

CONCLUSION

For the reasons stated above, Mr. Griffin respectfully submits that his petition for certiorari should be granted.

Respectfully Submitted,

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